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I Came, I Saw, I... Adapted: An Empirical Study of Chinese Business Expansion in the United States and its Legal and Policy Implications

Ji Li

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I Came, I Saw, I... Adapted: An Empirical Study of Chinese Business Expansion in the United States and its Legal and Policy Implications

Ji Li*

Abstract: China's economic expansion into the United States has generated intense debates and controversies. Some view it as posing a critical challenge to extant U.S. institutions; others see China as a stakeholder of the extant system and that the Chinese investors are by and large "playing our game." However, theories and hypotheses on the subject abounding, little is yet known how exactly Chinese investors interact with U.S. institutions and the legal implications of such interactions. Relying on the first comprehensive survey of Chinese companies investing in the United States, this Article fills the gap with an interdisciplinary study of the adaptation of Chinese investors to the U.S. legal and regulatory systems. Under a novel analytic frame, the study finds evidence that Chinese investors are largely commercially driven and adaptive to the host country environment. The article further evaluates this general finding with a case study, i.e., Chinese companies' adaptation to U.S. institutions governing employment discrimination, and finds confirming evidence. It then moves on to the discussion of two often-debated threats from China's business expansion in the United States: the threat to U.S. national security and the threat to free market capitalism. The empirical evidence suggests that Chinese investors are unlikely to pose major threats to extant U.S. institutions in the near future. In light of the findings, policymakers should resist the temptation to hastily erect overly protective measures in response to the sharp rise of Chinese investments. Regulated properly, Chinese investors may become major stakeholders of the U.S. institutions and contribute to their long-term resilience.

* Associate Professor, Rutgers Law School, J.D. 2007, Yale Law School; Ph.D. 2012, Northwestern University. Email: jli@kinoy.rutgers.edu. For valuable comments, the author thanks Susan Rose-Ackerman, Weitseng Chen, Jerome Cohen, Hualing Fu, Yunsong Ge, Shaowei Mao, Jing Leng, Robin Huang, Christopher Gane, Haitian Lu, Shitong Qiao, Benjamin Liebman, Li Guo, Curtis Milhaupt, Gary Francione, John Leubsdorf, Douglas Eakeley, Alan Hyde, Sabrina Safrin, Taja-Nia Y. Henderson, Yingmao Tang, Wei Zhang, Wentong Zheng and other participants in workshops and seminars hosted by the National University of Singapore Faculty of Law, University of Hong Kong Faculty of Law, the Chinese University of Hong Kong Faculty of Law, Peking University Law School, Peking University School of Transnational Law, University of California-Irvine Law School, and Rutgers Law School. For excellent assistance in editing this article, the author thanks Kara Cooper, William Carpenter, and the JILB Staff. The views expressed in this article do not reflect the official views of the Association or any of its members. All errors are mine.

TABLE OF CONTENTS

I. Introduction.....	145
A. Growth of the Chinese Economy and Investment in the United States	147
B. Diverging Views on Chinese Business Globalization	150
II. A Theory about Chinese Investors' Adaptation and Their Potential Threat.....	155
A. The Desire and Ability to Adapt to U.S. Institutions	155
1. The Desire to Adapt: Investment Motives and Perceptions of U.S. Institutions.....	157
(a) Investment Motives.....	157
(b) Perceptions of U.S. Institutions	158
2. Ability to Adapt: Decision-Making Power and Local Knowledge	160
B. Are U.S. Institutions Vulnerable to Potential Threat from Chinese Investment?	161
III. Survey Design and Administration	162
A. The Survey Design	162
B. The Administration of the Survey	163
C. Validity of the Survey Results.....	164
IV. Findings and Analysis of the Survey Study	168
A. The Desire of Chinese Investors to Adapt to U.S. Institutions .	169
1. Motives of Chinese Investment in the United States	169
2. Perceptions of U.S. Business, Legal, and Political Institutions	174
(a) The U.S. Social and Political System	174
(b) The U.S. Business Environment.....	176
(c) The U.S. Legal System	177
B. The Ability to Adapt to U.S. Institutions.....	179
1. The Allocation of Decision-Making Power	179
2. Access and Use of Knowledge and Skills Requisite for Adaptation	180
V. An In-Depth Case Study of Chinese Investors' Adaptation to U.S. Institutions	183
VI. Further Analysis of Two Potential Threats of Chinese Business Expansion	188
A. The CFIUS Review and the <i>Ralls</i> Decision	188
B. The Phantom Menace of State Capitalism with Chinese Characteristics	194
VII. Theoretical and Policy Implications	202
VIII. Conclusion.....	204

I. INTRODUCTION

This paper explores Chinese foreign direct investment (FDI) into the United States and its legal implications from an interdisciplinary perspective, with data from the first comprehensive survey of Chinese companies investing in the United States. As China has surpassed the United States to be the world's largest economy,¹ its business expansion abroad has triggered intense debates and many controversies. The optimists welcome it as providing much needed capital and knowledge without ideological strings attached.² The pessimists criticize the resource-orientation of the investments and their disruption to the market, legal, and political orders of the host countries.³

While Chinese business expansion traditionally gravitated towards developing countries, the United States has recently emerged as the leading national recipient of FDI from China.⁴ Following this trend, American scholars and policymakers are shifting their attention back home. The debate about Chinese investment in the United States, however, has so far relied mainly on anecdotal reports and case analysis.⁵ Insightful as some of these studies are, a panoramic view of the broad trend remains elusive. Moreover, extant studies rarely touch on the systemic and dynamic interactions between U.S. law and China's business expansion.

Based on the first ever comprehensive survey of Chinese companies investing in the United States, this article fills the gaps. It contributes to the debate about the implications of Chinese outward investment by exploring a few basic but important questions—how Chinese investors perceive U.S. business, legal, and political systems, whether they would adapt to this foreign environment, and if yes, how? These questions are important because Chinese investors readily adapting to U.S. institutions presumably pose less of a threat. For instance, the U.S. subsidiary of Haier, a major

¹ Measured in purchasing power parity. *China Surpasses U.S. to Become Largest World Economy*, FOX NEWS (Dec. 6, 2014), <http://www.foxnews.com/world/2014/12/06/china-surpasses-us-to-become-largest-world-economy>.

² See generally DEBORAH BRAUTIGAM, *THE DRAGON'S GIFT: THE REAL STORY OF CHINA IN AFRICA* (2010); Timothy Webster, *China's Human Rights Footprint in Africa*, 51 COLUM. J. TRANSNAT'L L. 626 (2013).

³ See generally Barry Sautman & Hairong Yang, *African Perspectives on China-African Links*, 199 CHINA Q. 728, 729 n.6 (2009); Denis M. Tull, *China's Engagement in Africa: Scope, Significance and Consequences*, 44 J. MOD. AFR. STUD. 459 (2006); Ivar Kolstad & Arne Wiig, *Better the Devil You Know? Chinese Foreign Direct Investment in Africa*, 12 J. AFR. BUS. 31 (2011).

⁴ See *China Global Investment Tracker 2014*, AM. ENTER. INST. (last visited Oct. 18, 2015), <http://www.heritage.org/research/projects/china-global-investment-tracker-interactive-map>; Derek Scissors, *A Third Straight Record for Chinese Investment in the U.S.*, AM. ENTER. INST. (Jan. 12, 2015), <https://www.aei.org/publication/third-straight-record-chinese-investment-us>.

⁵ See, e.g., EDWARD S. STEINFELD, *PLAYING OUR GAME: WHY CHINA'S RISE DOESN'T THREATEN THE WEST* (2010).

Chinese appliances manufacturer, may well outperform its American competitors, but policymakers should have less to worry if the only differences between the two are brand name and improved efficiency and customer service. On the other hand, if Chinese investors systematically disobey U.S. law and code of business conduct, their growing presence in this country will undoubtedly breed conflict and threaten extant U.S. institutions.

This study proposes a novel theoretical frame to analyze the adaptation (or lack thereof) of Chinese investors to host country institutions. It then examines the data from the survey of Chinese investments in the United States and finds preliminary evidence indicating their commercial motives such as access to market, advanced technology, and brand enhancement (See Figure 8). In addition, the survey findings suggest that Chinese investors share a generally positive view of U.S. business, legal, and political systems,⁶ despite recent damage to U.S. soft power. Moreover, the study indicates that many Chinese investors, by relying heavily on local talent and professionals, readily adapt to extant U.S. institutions.⁷ This general finding is then evaluated and substantiated with an in-depth analysis of Chinese investors' adaptation to U.S. institutions for the prevention of employment discrimination. Taking an interdisciplinary approach, the article further explores two of the most-debated threats of FDI from China, i.e., the threat to U.S. national security and more broadly the threat to free market capitalism

The article will proceed as follows. The next two subsections of Part I present a summary description of China's economic growth and expansion abroad over the past few decades and the controversies and debates on the impacts. Next, Part II presents the theory for analyzing the adaptation (or lack thereof) of Chinese investors and lays the basis for an interdisciplinary analysis of their impact on extant U.S. institutions. Part III then describes the design and validity of the survey research on Chinese companies investing in the United States. Applying the survey results, Part IV probes the motivations of Chinese investors, their perceptions of U.S. business, legal, and political systems, and their ability to adapt. Part V then evaluates the general findings using an in-depth study of Chinese investors' adaptation to U.S. institutions regarding employment discrimination. Part VI examines two intensely debated potential threats Chinese business expansion poses to the United States, i.e., threats to its national security and to the U.S. model of free market capitalism. Last, Part VII briefly discusses the contributions of the research, and Part VIII concludes the article.

⁶ See *infra* Part IV.A.2.

⁷ See *infra* Parts IV.B.2 and V.

A. Growth of the Chinese Economy and Investment in the United States

Measured in purchasing power parity (PPP), China has surpassed the United States as the number one economy in the world.⁸ After four-decades of unprecedented economic growth, China now tops the world ranking in, inter alia, international trade,⁹ energy consumption,¹⁰ mobile phone users,¹¹ automobile sales,¹² steel production,¹³ foreign currency reserves,¹⁴ and Internet users.¹⁵ Even measured at the current exchange rate, China is already the world's second largest economy and, barring natural, political, or economic catastrophes of a very large scale, is set to overtake the United States in about a decade.¹⁶ Yet given the size of the Chinese population and its comparatively low level of living standard, the country still holds enormous potential to grow.¹⁷ Some have even begun to contemplate whether and when the Chinese economy would double that of the United States.¹⁸

Decades of meteoric growth finally lifted the floodgate for China's outbound investment, which experienced a recent surge (See Figure 1) due to a confluence of factors such as large current account surpluses, a huge foreign currency reserve,¹⁹ growing corporate profits,²⁰ and loosening

⁸ Measured in purchasing power parity. FOX NEWS, *supra* note 1.

⁹ *China Eclipses U.S. as Biggest Trading Nation*, BLOOMBERG (Feb. 10, 2013), <http://www.bloomberg.com/news/2013-02-09/china-passes-u-s-to-become-the-world-s-biggest-trading-nation.html>.

¹⁰ Spencer Swartz & Shai Oster, *China Tops U.S. in Energy Use*, WALL ST. J. (July 18, 2010), <http://online.wsj.com/news/articles/SB10001424052748703720504575376712353150310>.

¹¹ Gao Yuan, *Nation Becoming Top Mobile Phone Market*, CHINA DAILY (May 30, 2014), http://www.chinadaily.com.cn/business/2014-05/30/content_17552888.htm.

¹² *China Ends U.S.'s Reign as Largest Auto Market*, BLOOMBERG (Jan. 11, 2010), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aE.x_r_19NZE.

¹³ *China Steel Industry Facing Harshes Ever Operating Environment*, BLOOMBERG (Apr. 30, 2014), <http://www.bloomberg.com/news/2014-04-30/china-steel-industry-facing-harshes-ever-operating-environment.html>.

¹⁴ *China's Forex Reserve Returns 'Relatively Good'*, WALL ST. J. (June 12, 2014), <http://online.wsj.com/articles/chinas-forex-reserve-returns-relatively-good-1402553350>.

¹⁵ David Barboza, *China Surpasses U.S. in Number of Internet Users*, N.Y. TIMES (July 26, 2008), http://www.nytimes.com/2008/07/26/business/worldbusiness/26internet.html?_r=0.

¹⁶ Malik Singleton, *OECD Report Says China's Economy Will Overtake US Economy By 2016*, INT. BUS. TIMES (Mar. 22, 2013), <http://www.ibtimes.com/oecd-report-says-chinas-economy-will-overtake-us-economy-2016-1146333>.

¹⁷ CRAIG K. ELWELL ET AL., CONG. RESEARCH SERV., RL33604, IS CHINA A THREAT TO THE U.S. ECONOMY? 14 (2007).

¹⁸ *Economist: China's Economy to Double That of US in 20 Years*, PEOPLE'S DAILY (Mar. 24, 2011), <http://english.peopledaily.com.cn/90001/90778/90862/7330326.html>.

¹⁹ WALL ST. J., *supra* note 14.

²⁰ ANDREW SZAMOSZEGI, U.S.-CHINA ECON. & SEC. REVIEW COMM'N, AN ANALYSIS OF CHINESE INVESTMENTS IN THE U.S. ECONOMY 5-6 (2012), <http://origin.www.uscc.gov/sites/>

government regulations.²¹ Much of Chinese investment outflows traditionally took the form of sovereign debt, and Beijing's vast holding of U.S. treasury securities (\$1,254.8 billion as of October 2015²²) has stirred up a fair amount of controversies ranging from latent threat to U.S. national security to the distortion of the credit market.²³

While dust has yet to settle on the implications of China's holdings of U.S. sovereign securities, scholars and policymakers have shifted their attention to the soaring outward direct investment. From a trivial amount of \$830 million in 1990, Chinese investment abroad reached \$101 billion in 2013 (See Figure 1), making it the world's third largest source of FDI.²⁴ Though the outward FDI was at a time concentrated in Africa and other developing regions for securing a stable supply of natural resources, more Chinese companies are now targeting their investments at developed markets.²⁵

default/files/Research/11-7-

12_An_Analysis_of_Chinese_Investments_in_the_U.S._Economy%28CTI%29.pdf

²¹ Yue-Fang Si, *The Development of Outward FDI Regulation and the Internationalization of Chinese Firms*, 23 J. CONTEMP. CHINA 804, 816–17 (2014).

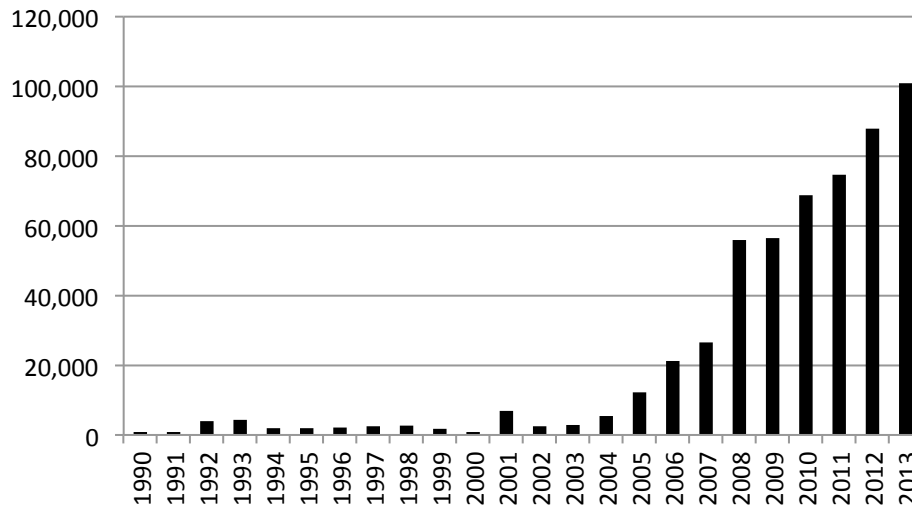
²² Data available at the official website for U.S. Treasury Department. U.S. DEP'T OF TREAS., MAJOR FOREIGN HOLDERS OF TREASURY SECURITIES (Dec. 15, 2015), <http://ticdata.treasury.gov/Publish/mfh.txt>.

²³ For a list of concerns with the implications of the large holdings, see WAYNE M. MORRISON & MARC LABONTE, CONG. RESEARCH SERV., RL34314, CHINA'S HOLDINGS OF U.S. SECURITIES: IMPLICATIONS FOR THE U.S. ECONOMY 10 (2013), <https://www.fas.org/srg/crs/row/RL34314.pdf>. For the argument of moderate threat, see, for example, Daniel W. Drezner, *Bad Debts: Assessing China's Financial Influence in Great Power Politics*, INT. SECUR. 7 (2009). For the argument that low-cost borrowing from China led to abundant cheap credit in the U.S. market, which encouraged excessive debt-financed expansion, led to the real estate bubble, and eventually ignited the global financial crisis, see Heleen Mees, *How China's Boom Caused the Financial Crisis*, FOREIGN POLICY (Jan. 17, 2012), http://www.foreignpolicy.com/articles/2012/01/17/how_china_s_boom_caused_the_financial_crisis; Neil Irwin, *Fed Chairman Ben Bernanke Says U.S. Policy Isn't Causing Global Financial Woes*, THE WASH. POST (Feb. 19, 2011), <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/18/AR2011021807046.html>.

²⁴ Karl Sauvart, *Challenges for China's Outward FDI*, CHINA DAILY (Oct. 31, 2013, 7:10 AM), http://usa.chinadaily.com.cn/opinion/2013-10/31/content_17070440.htm.

²⁵ Andreas Klossek et al, *Chinese Enterprises in Germany: Establishment Modes and Strategies to Mitigate the Liability of Foreignness*, 47 J. WORLD BUS. 35, 35 (2012).

Figure 1: China's Total FDI Outflow (1990–2013; million U.S. dollars)



Data source: UNCTAD, World Investment Report 2014, Annex table 02 - FDI outflows, by region and economy, 1990–2013.

In line with this general trend, Chinese investment in the United States has recently exceeded U.S. investment in China, reversing for the first time in the past three decades the direction of net capital flows between the world's two largest economies.²⁶ Historically, a backwater for FDI from China,²⁷ the United States holds irresistible charm to Chinese investors, as evidenced by a recent Economist Intelligence Unit report ranking it number one among more than 200 countries in terms of attractiveness to Chinese FDI.²⁸ True to this prediction, the United States has emerged as the biggest national recipient of investments from China²⁹ after a few years of explosive growth (See Figure 2).

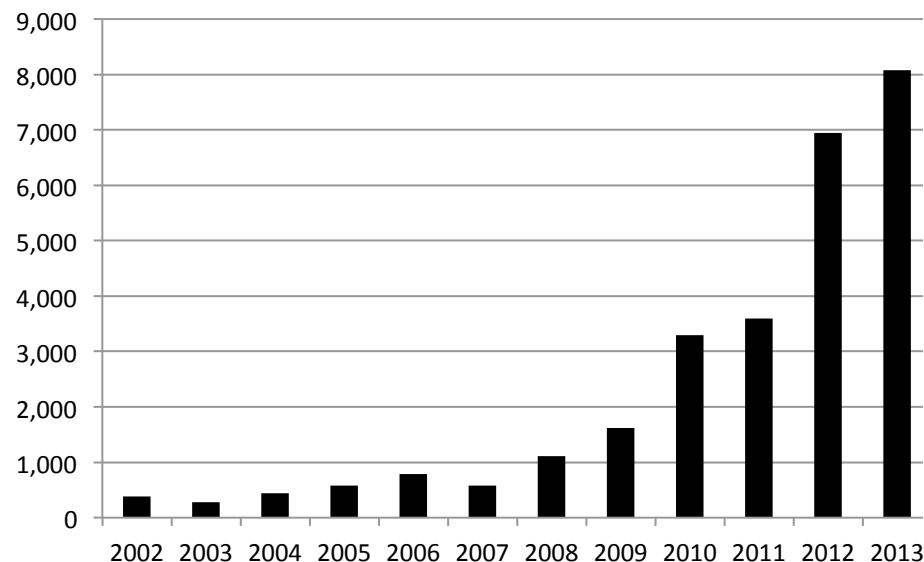
²⁶ Toh Han Shih, *China's Surging Investment in US Heralds New Multinational Era*, S. CHINA MORNING POST (Aug. 4, 2014), <http://www.scmp.com/business/china-business/article/1565759/chinas-surging-investment-us-heralds-new-multinational-era>.

²⁷ China did not even enter the list of top ten investor countries, measured by the 2010–2012 average. See U.S. DEP'T OF COM., FOREIGN DIRECT INVESTMENT IN THE UNITED STATES 6 (Oct. 2013), https://www.whitehouse.gov/sites/default/files/2013fdi_report_-_final_for_web.pdf.

²⁸ *China Going Global Investment Index*, ECONOMIST INTELLIGENCE UNIT (2013), http://china.ucsd.edu/_files/odi-2013/09232013_Paper_Liu_ChinaGoingGlobal.pdf.

²⁹ AM. ENTER. INST., *supra* note 4.

Figure 2: China's Outbound FDI in the United States (2002–2013; million U.S. dollars)



Data source: Bureau of Economic Analysis, U.S. Department of Commerce.

B. Diverging Views on Chinese Business Globalization

Given its significant implications, the dramatic Chinese business expansion abroad has caught close attention of scholars and policymakers worldwide, who have expressed two diverging views: one welcoming the expansion as broadly beneficial and the other dismissing it as a critical threat. Those in the former camp observe an ascending China opting to “play our game.”³⁰ Enabled partially by embracing Western institutions,³¹ the Chinese business expansion will fortify the established system and benefit the United States in the long run.³² Also, the existing global order is sufficiently open and inclusive to accommodate a rising superpower without necessarily experiencing any major disruptions. In addition, China is distinguishable from previous emerging powers in the large stake it holds in maintaining the extant global order.³³ More concretely, Chinese direct

³⁰ EDWARD S. STEINFELD, *PLAYING OUR GAME: WHY CHINA’S RISE DOESN’T THREATEN THE WEST* 265 (2010).

³¹ *Id.*

³² Aaron L. Friedberg, *The Future of U.S.-China Relations: Is Conflict Inevitable?*, *INT. SECUR.* 1, 12–14 (2005).

³³ G. John Ikenberry, *The Rise of China and the Future of the West*, 87 *FOREIGN AFF.* 23, 29–32

investment in the United States will bring immediate benefits such as new jobs and additional research and development.³⁴

Somewhat ironically, a few reach the same optimistic view by trivializing the ability of Chinese multinational corporations to compete with U.S. companies as Chinese entrepreneurs tend to focus on making short-term gains, diversifying business, and cultivating good government relationships.³⁵ Moreover, seemingly “profitable” Chinese state-owned enterprises (SOEs) rely heavily on various government subsidies and/or their politically-secured oligopolistic positions in the Chinese market.³⁶ To these commentators the current concern with the Chinese business expansion is little more than *déjà vu*.³⁷ Despite the fear of and the prediction about a rising Japan replacing the United States as the world’s economic hegemon in the 1980s,³⁸ the U.S. system eventually proved more resilient and competitive.³⁹

Another group holding the non-threat view, consisting mostly of business scholars, sees Chinese investors’ global expansion track closely conventional patterns of cross-border investment. Its net effect on the host country is a function of multiple factors such as investment motives and the development gap between the host and the home states.⁴⁰ Companies from developed countries, for instance, tend to transplant their corporate governance and management style to their overseas operations. By comparison, investors from developing countries, unable to rely on home-developed efficiency measures or technics, are more inclined to adapt to the host state environment.⁴¹

On the other side of the debate are those perceiving the Chinese economic expansion abroad as a critical threat.⁴² Some in this camp are

(2008).

³⁴ See generally THEODORE MORAN & LINDSAY OLDENSKI, FOREIGN DIRECT INVESTMENT IN THE UNITED STATES: BENEFITS, SUSPICIONS, AND RISKS WITH SPECIAL ATTENTION TO FDI FROM CHINA (2013).

³⁵ See George J. Gilboy, *The Myth Behind China’s Miracle*, 83 FOREIGN AFF. 33, 42 (2004).

³⁶ UNIRULE INSTITUTE OF ECONOMICS, THE NATURE, PERFORMANCE, AND REFORM OF THE STATE-OWNED ENTERPRISES 34 (APR. 12, 2011), <http://www.unirule.org.cn/xiazai/2011/20110412.pdf>.

³⁷ Curtis J. Milhapt, *Chinese Investment: A Case of Déjà Vu for the United States*, 4 E. ASIAN F. Q. 1, 34 (2012).

³⁸ The most famous work is probably by PAUL M. KENNEDY, *THE RISE AND FALL OF THE GREAT POWERS: ECONOMIC CHANGE AND MILITARY CONFLICT FROM 1500 TO 2000* (1989).

³⁹ Sean Starrs, *American Economic Power Hasn’t Declined? It Globalized! Summoning the Data and Taking Globalization Seriously*, 57 INT. STUD. Q. 817, 827 (2013).

⁴⁰ See Randall Morck et al., *Perspectives on China’s Outward Foreign Direct Investment*, 39 J. INT. BUS. STUD. 337, 348 (2008).

⁴¹ Xiaohua Yang et al., *A Comparative Analysis of the Internationalization of Chinese and Japanese Firms*, 26 ASIA PAC. J. OF MGMT. 141, 156 (2009).

⁴² For a summary of the pessimistic views, see Aaron L. Friedberg, *The Future of U.S.-China Relations: Is Conflict Inevitable?*, 30 INT. SECUR. 1, 17–22 (2005).

concerned with the practical risks of Chinese outbound investment, especially in developing countries. Chinese companies investing in Africa, for instance, have allegedly spawned corruption, disrespect of law and human rights violations, and have on occasion even supported ruthless dictators.⁴³ Even Chinese officials lamented that the outbound investors might be “exporting China’s domestic problems.”⁴⁴ The threat may persist as Chinese companies show a tendency to invest in resource-rich countries with weak institutions⁴⁵ and have a tolerance for high political risk.⁴⁶

To some naysayers, the critical threat originates from China’s practice of state capitalism.⁴⁷ Supported by a highly interventionist government with vast resources, Chinese SOEs pose a formidable challenge to free market capitalism.⁴⁸ And such challenge may not come only from the SOEs as private Chinese companies, once recognized as national champions, will be co-opted and receive the state’s largess.⁴⁹ Given the resources controlled by the Chinese government, its “corporate agents” pose at least a short or medium-term threat to Western firms in the global market.⁵⁰

Other opponents take notice of the Chinese government’s discontent with the extant international system shaped and gingerly guarded by the United States and its allies. To have more voice in global political and economic affairs, China has undertaken initiatives to build alternative multilateral institutions. It recently coordinated and sponsored the establishment of the BRICS New Development Bank, viewed by some as the developing country alternative of the Bretton Woods institutions for financing global development.⁵¹ China has also proposed to create the Asian

⁴³ For a brief summary of the negative media coverage of China-African links, see Barry Sautman & Hairong Yang, *African Perspectives on China-African Links*, 199 CHINA Q. 728, 729 n.6 (2009); Denis M. Tull, *China’s Engagement in Africa: Scope, Significance and Consequences*, 44 J. OF MODERN AFR. STUD. 459 (2006); Ivar Kolstad & Arne Wiig, *Better the Devil You Know? Chinese Foreign Direct Investment in Africa*, 12 J. AFR. BUS. 31 (2011).

⁴⁴ Zhongguo Qiye “Zouchuqu” Yao Tupo “Xingxiang Kunju” (中国企业“走出去”要突破“形象困局”) [*Chinese Companies Going Abroad Should Change Image*], LIAOWANG (瞭望) (Oct. 2, 2012), <http://finance.chinanews.com/cj/2012/10-22/4265426.shtml>.

⁴⁵ E.g., Bala Ramasamy et al., *China’s Outward Foreign Direct Investment: Location Choice and Firm Ownership*, 47 J. WORLD BUS. 17, 20, 23 (2012); Peter J. Buckley et al., *The Determinants of Chinese Outward Foreign Direct Investment*, 38 J. INT. BUS. STUD. 499, 506, 510 (2007).

⁴⁶ Diego Quer et al., *Political Risk, Cultural Distance, and Outward Foreign Direct Investment: Empirical Evidence from Large Chinese Firms*, 29 ASIA PAC. J. MGMT. 1089, 1092 (2012).

⁴⁷ *The Rise of State Capitalism*, THE ECONOMIST (Jan. 21, 2012), <http://www.economist.com/node/21543160>.

⁴⁸ See generally Ian Bremmer, *State Capitalism Comes of Age: The End of the Free Market?*, 88 FOREIGN AFF. 40 (2009).

⁴⁹ Curtis J. Milhaupt & Wentong Zheng, *Beyond Ownership: State Capitalism and the Chinese Firm*, 103 GEO. L. J. 665, 688–700 (2015).

⁵⁰ *The Rise of State Capitalism*, supra note 47.

⁵¹ Raj M. Desai & James Raymond Vreeland, *What the New Bank of BRICS Is All About*, WASH. POST: MONKEY CAGE (July 17, 2014), <http://www.washingtonpost.com/blogs/monkey->

Infrastructure Investment Bank,⁵² a regional multilateral institution to boost China's influence and to overshadow the Asian Development Bank dominated by the United States and Japan.⁵³ And soon after the global financial crisis, China put forward a plan to replace the U.S. dollar as the world reserve currency with special drawing rights based on a bundle of currencies.⁵⁴ Moreover, China inaugurated the Shanghai Cooperation Organization, an international body aimed at creating and expanding military cooperation among the regional powers.⁵⁵ Some are alarmed by its potential to undermine democracy in the member states.⁵⁶ In sum, the pessimists raise a red warning sign stating that the ascent of China, if not properly managed by the West, will mark the global turn heralding "a dark era of ideological contention and geopolitical rivalry."⁵⁷

To summarize thus far, the burgeoning literature on the ramifications of China's global expansion reflects diverging views. The insights generated from the debate, however, are inadequate to answer some of the most pressing questions about the impacts of soaring Chinese FDI on U.S. business, legal, and political systems. As noted earlier, one major shortcoming of the literatures is methodological, as many have relied on investigating a small number of Chinese companies.⁵⁸ While ethnographic studies can present valuable details and contexts about Chinese FDI in the United States, the induced theories tend to be limited in application. Though a few recent studies used survey and other quantitative methods,⁵⁹ the

cage/wp/2014/07/17/what-the-new-bank-of-brics-is-all-about/.

⁵² Jane Perlez, *U.S. Opposing China's Answer to World Bank*, N.Y. TIMES, Oct. 10, 2014, at A1, A10.

⁵³ Peng Lam, *China's Asian Infrastructure Investment Bank: East Asian Responses*, 6 E. ASIAN POLICY 127 (2014).

⁵⁴ Jamil Anderlini, *China Calls for New Reserve Currency*, FIN. TIMES (Mar. 24, 2009), <http://www.ft.com/intl/cms/s/0/7851925a-17a2-11d0-8c9d-0000779fd2ac.html#axzz3DcTbEkqs>.

⁵⁵ E.g., Jing-Dong Yuan, *China's Role in Establishing and Building the Shanghai Cooperation Organization (SCO)*, 19 J. CONTEMP. CHINA 855, 856 (2010); Pax Sinica: China is Trying to Build a New World Order, Starting in Asia, THE ECONOMIST, Sept. 20, 2014, at 39.

⁵⁶ Thomas Ambrosio, *Catching the 'Shanghai Spirit': How the Shanghai Cooperation Organization Promotes Authoritarian Norms in Central Asia*, 60 EUR.-ASIA STUDIES 1321, 1322 (2008).

⁵⁷ CHARLES A. KUPCHAN, NO ONE'S WORLD: THE WEST, THE RISING REST, AND THE COMING GLOBAL TURN 205 (2012).

⁵⁸ See, e.g., STEINFELD, *supra* note 5, at 176; Yang et al., *supra* note 41, at 147 (using just two institutions); Ping Deng, *Why do Chinese Firms Tend to Acquire Strategic Assets in International Expansion?* 44 J. WORLD BUS. 74, 79 (2009) (using just three institutions); Huaichuan Rui & George S. Yip, *Foreign Acquisitions by Chinese Firms: A Strategic Intent Perspective*, 43 J. WORLD BUS. 213, 218 (2008) (using just three institutions).

⁵⁹ For instance, a critical literature review of all articles on the internationalization of Chinese firms published in major scholarly journals found thirteen studies that used a survey method. Ping Deng, *The Internationalization of Chinese Firms: A Critical Review and Future Research*, 14 INT'L J. MGMT. REVS. 408, 410 (2012).

government-reported macro-level data they relied on to investigate Chinese outbound investment were often biased and misleading.⁶⁰ As a result, and given that soaring FDI inflows from China are a relatively new phenomenon,⁶¹ we are still in the dark as to why Chinese investors choose the United States, how they interact with U.S. institutions, and whether they will constitute a critical threat.

Another drawback of the literatures is their relatively narrow scope. As most of the studies on Chinese outward investment were led by business scholars and social scientists, the questions they have investigated rarely touch on the dynamic interactions between the investors and the U.S. legal and regulatory systems. Yet in contrast to most developing countries, formal rules in the United States should play an essential role in shaping the behavior of Chinese investors. Having neglected the legal dimension, the literatures leave huge gaps.⁶²

In sum, fast ascending the international pecking order economically and politically, China and its global business expansion have attracted enormous scholarly interest. Yet previous studies about the effects of Chinese outward investment have left important questions under-explored. Taking an interdisciplinary approach, this Article fills the gaps by empirically investigating the adaptation (or lack thereof) of Chinese investors to extant U.S. institutions. This Article will also provide preliminary empirical analysis of the investment's potential threats to the United States by examining two much-debated topics: (1) the threat of Chinese investors' acquisition of U.S. assets to U.S. national security and the adequacy of the CFIUS review regime to prevent or mitigate any such threat, especially after the recent landmark decision by the D.C. Circuit finding unconstitutional certain procedures of the CFIUS review in *Ralls v. CFIUS*, and (2) the threat of the Chinese variant of state capitalism to the U.S. model of free market capitalism. The following Part II presents an analytical framework for examining the adaptation of Chinese investors to U.S. institutions.

⁶⁰ Dylan Sutherland & John Anderson, *The Pitfalls of Using Foreign Direct Investment Data to Measure Chinese Multinational Enterprise Activity*, 221 CHINA Q. 21, 25–27 (2015).

⁶¹ SZAMOSZEGI, *supra* note 20, at 30.

⁶² For example, the differences between Chinese FDI and Japanese FDI in terms of local hiring are attributed mostly to different stages of development of the two home countries. Yang et al., *supra* note 41, at 156. Little did the author discuss any possible impact of the Japan–US FCN Treaty that allowed Japanese companies to appoint managers of their choice and the absence of such favorable treaty benefits for Chinese investors in the U.S. Though a few legal scholars have begun to pay attention to Chinese investment in the U.S., lacking empirical data, their research remains speculative. See, e.g., Curtis J. Milhaupt, *Is the U.S. Ready for FDI from China? Lessons from Japan's Experience in the 1980s*, in INVESTING IN THE UNITED STATES: IS THE U.S. READY FOR FDI FROM CHINA? 185 (Karl Sauvant, ed., 2009).

II. A THEORY ABOUT CHINESE INVESTORS' ADAPTATION AND THEIR POTENTIAL THREAT

As noted in Part I, soaring investment outflows from China have generated intense debates and controversies. The current debate about China's business expansion in the United States, in a nutshell, revolves around three different levels of threat: the threat of Chinese investment to U.S. national security, the threat to important interests of various social segments such as labor rights, and the systemic threat of the Chinese model of capitalism to free market economy. While the focus may vary, most parties to the debate share the under-investigated and under-theorized assumption that Chinese investors' behavior systemically differs from their U.S. competitors'.

This study contributes to the debate in two ways. First, it analyzes and then empirically explores the key assumption that Chinese investors act differently from their U.S. counterparts. Second, it engages in an interdisciplinary analysis of the U.S. institutions' responses to the potential threat from China's business expansion; it is unlikely for the perceived threat to materialize if there exist adequate preventive and remedial measures, or if the U.S. institutions prove more competitive and resilient.

A. The Desire and Ability to Adapt to U.S. Institutions

As Professor Edward Steinfeld elaborates in the study of a major state-owned Chinese oil company, Chinese investors may be adaptive and "playing our game" in the global market.⁶³ To further explore the adaptation (or lack thereof) of Chinese companies, I employ a novel theory that unpacks the concept into two components, the desire to adapt to U.S. institutions and the ability to do so (See Figure 3).⁶⁴ If Chinese companies investing in the United States have both a strong desire and ability to adapt (Quadrant IV of the two-by-two matrix), they will soon behave like their local competitors; hence posing limited threats to extant U.S. institutions. On the contrary, Chinese investors with neither the desire nor the ability to adapt will transplant their home country practices to the United States (Quadrant I), which may constitute a serious threat to the U.S. institutions or social segments that have not adopted adequate protective measures. Between the two ends of the spectrum are Chinese investors willing but incapable of adaptation (Quadrant III) and those able but unwilling to do so (Quadrant II). For purposes of this article, institutions are defined broadly to

⁶³ STEINFELD, *supra* note 5.

⁶⁴ In creating this typology, I draw on inspirations from the analytical framework for understanding state-private business relations in China, see Kellee S. Tsai, *Capitalists Without a Class: Political Diversity Among Private Entrepreneurs in China*, 38 COMP. POL. STUD. 1130, 1145 (2005).

include both formal rules such as laws and regulations, and informal rules such as socially accepted code of business conduct.

From U.S. policy perspective, it should be optimal to have most of the Chinese companies fall into Quadrant IV, where they exhibit both the capacity and the desire to make necessary adjustments to the host country environment. Conversely, Quadrant I probably identifies the worst fear of those critical about Chinese outward investment. Quadrant III is not ideal either. While superficial adaptation and compliance with U.S. institutions may have been achieved, the Chinese investors will attempt to maintain home-country practices whenever possible, potentially causing conflicts in the host state, especially in areas of inadequate or uncertain formal regulations. Quadrant II presents situations where investors will adapt provided adequate capacity. Thus the threat tends to be temporary. This study will empirically assess the distribution of the adaptation behavior of Chinese companies investing in the United States. But before the evidentiary analysis, more conceptual elaboration is in order.

Figure 3: Theoretical Framework for the Adaptation of Chinese Investors to U.S. Institutions

		Desire to Adapt to U.S. Institutions	
		No	Yes
Ability to Adapt to U.S. Institutions	No	<p>I</p> <p>will maintain Chinese practices; potential long-term threat or disruption</p>	<p>II</p> <p>will maintain Chinese practices, but will adapt whenever capable; potential temporary threat or disruption</p>
	Yes	<p>III</p> <p>may reluctantly and superficially adapt, while trying to maintain Chinese practices; some potential threat or disruption</p>	<p>IV</p> <p>will act like U.S. companies; limited potential threat or disruption</p>

The desire and the ability to adapt are vague and broad concepts that have to be further deconstructed to enable empirical analysis. I postulate that Chinese investors' desire to adapt is determined by two factors: (i) their investment motives, and (ii) their perceptions of U.S. institutions. On the other hand, the ability to adapt is a function of: (i) the corporate decision-making power allocation, and (ii) the access and use of knowledge and skills requisite to make the adaptation. More details follow.

1. The Desire to Adapt: Investment Motives and Perceptions of U.S. Institutions

(a) Investment Motives

Motives are essential in setting behavior. Are foreign companies investing in the United States driven by political concerns or commercial interests? Companies following the government's fiat to "go global" and invest in the United States do not necessarily think or behave rationally in the business sense, i.e., maximizing corporate profits, which presumably affects their desire to adapt to local conditions. In contrast, foreign investors attracted to the United States by business and commercial considerations should respond to incentive mechanisms in ways analogous to private companies. To them, U.S. regulatory and legal frameworks should function more effectively since they are usually designed to shape the behavior of rational business actors in a free market.

The question is more acute with regard to investment from China, as the Chinese government plays a highly proactive role in regulating and managing economic affairs. The unique Chinese model of state-business relationships has been labeled state capitalism.⁶⁵ A more systematic review of the topic will be postponed to Section VI(B), but a brief summary follows immediately to aid further discussion.

Before initiating economic liberalization in the early 1980s, the Chinese government modeled its economic system after the Soviet Union and almost all business entities in China were collectively owned and managed.⁶⁶ After various incremental reforms in the 1980s failed to improve the performance of the SOEs,⁶⁷ Beijing decided to shed the liability by implementing massive privatization.⁶⁸ Consequently, the state sector shrank and the central government retained control only over the largest SOEs in strategic and important sectors.⁶⁹

⁶⁵ A generally agreed definition of state capitalism is lacking. One defines it as "a system in which the state functions as the leading economic actor and uses markets primarily for political gain." Bremmer, *supra* note 48, at 41; another defines state capitalism as "the widespread influence of the government in the economy, either by owning majority or minority equity positions in companies or by providing subsidized credit and/or other privileges to private companies." ALDO MUSACCHIO & SERGIO G. LAZZARINI, *REINVENTING STATE CAPITALISM* 2 (2014).

⁶⁶ Sujian Guo, *The Ownership Reform in China: What Direction and How Far?*, 36 J. OF CONTEMP. CHINA 553, 556 (2003).

⁶⁷ *Id.* at 559.

⁶⁸ Ross Garnaut et al., *Impact and Significance of State-Owned Enterprise Restructuring in China*, 55 THE CHINA J. 35 (2006).

⁶⁹ *Id.*, at 52–53. "Between 1995 and 2001, the number of state-owned and state-controlled enterprises in China fell from 118,000 to 47,000 and total employment in the SOE sector fell by 36 million."

Meanwhile, the central government took a series of measures to further “modernize” the SOEs.⁷⁰ As a result of the decade-long efforts, most of the remaining central SOEs have concentrated their profitable assets and operations in publicly listed companies with “modern” corporate governance.⁷¹ The privatization through listing on stock markets, domestic as well as foreign, diversified the ownership structure, enabled learning of foreign practices and expertise, and opened channels for future finance.⁷²

While by definition all SOEs are controlled by the government, the abstract term “state” does not adequately explain how these conglomerates are actually managed, and how they interact with government officials. Actions taken by Chinese SOEs vary as a function of multiple variables including the managers’ positions in the political hierarchy, ownership diversity and density, the managers’ promotion probability and political stature, and sectorial characteristics.⁷³ Apart from the 140,000 SOEs currently in existence, it has been alleged that the Chinese government maintains close ties with private national champions and implements certain state policies through them.⁷⁴

China’s practice of state capitalism has also instigated the argument that Chinese companies expanding abroad serve primarily the interests of their home state, not their own or those of the host countries, especially in cases of unalloyed interests. Those on the other side of the debate, however, contend that commercial interests shape the investment behavior of Chinese companies. To maximize profits and minimize risk, Chinese investors aspire to “play our game” and do it well.⁷⁵ This empirical study will weigh in on this debate by analyzing survey data about the investment motives of Chinese companies in the United States.

(b) Perceptions of U.S. Institutions

Besides investment motives, perceptions also form an important part in the desire to adapt. Corporate executives who perceive their original management style and organizational structure to be highly efficient will be reluctant or refuse to make internal adjustments to comply with host country rules. Likewise, companies that view the host country institutions negatively will resist adaptation. Let me elaborate with the example of early

⁷⁰ Ji Li, *State-Owned Enterprises in the Current Regime of Investor-State Arbitration*, in *THE ROLE OF THE STATE IN INVESTOR-STATE ARBITRATION* 380 (Shaheez Lalani & Rodrigo Polanco eds., 2014).

⁷¹ Gongmeng Chen, *Have China’s Enterprise Reforms Led to Improved Efficiency and Profitability?*, 7 *EMERGING MKTS. REV.* 82, 87–88 (2006).

⁷² *Id.*

⁷³ Li, *supra* note 70, at 380.

⁷⁴ Curtis J. Milhaupt & Wentong Zheng, *Beyond Ownership: State Capitalism and the Chinese Firm*, 103 *GEO. L. J.* 665, 668–69 (2015).

⁷⁵ STEINFELD, *supra* note 5, at 233.

Japanese investment in the United States.

As a result of rising trade conflicts, rapid appreciation of yen, and quick economic recovery from World War II, the Japanese government reversed its policies of heavily regulating outbound investment in early 1980s.⁷⁶ A surge of Japanese outbound investment ensued.⁷⁷ The Japanese corporate structure and management model were dramatically different from what had been familiar to American companies. Lifetime employment, strict corporate hierarchy, and a high level of homogeneity in the workforce contradicted not only the neo-classic economists' prescriptions for corporate efficiency but also U.S. regulations against employment discrimination.⁷⁸

Many Japanese investors, regarding their model as superior to the one for American companies, were reluctant to adapt.⁷⁹ It was therefore perceived as quite a common practice to fill positions in their U.S. operations with employees expatriated from Japan, and to reserve management positions for senior male Japanese.⁸⁰ The Japanese government shared the perception, noting that it "had devised a Japan Model of growth far superior to the model long championed by the economically troubled United States."⁸¹ Not until the persisting underperformance of the Japanese economy of the past two decades did the Japanese companies start to act more like their U.S. competitors.⁸²

In the meantime, the collision between the two systems forever altered the U.S. legal landscape. Besides the drastic reform of the national security review regime in response to surging Japanese acquisitions of strategic U.S. assets,⁸³ American jurisprudence with regard to a wide variety of subject matter areas bears clear marks of legal responses to new legal issues associated with Japanese investors in the United States.⁸⁴

⁷⁶ See generally You-Il Lee, *Political Economy of Korean and Japanese Foreign Direct Investment*, 29 J. OF CONTEMP. ASIA 462 (1999).

⁷⁷ *Id.*

⁷⁸ PETER HALL & DAVID SOSKICE, *VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE* 99–100 (2001).

⁷⁹ Yang et al., *supra* note 41, at 141.

⁸⁰ Sara Clark, *Maintaining Yoshino's Traditional Hierarchy: The Roles of Gender and Race in Japanese Transplant Management*, 9 J. ORGANIZATIONAL CHANGE MGMT. 6 (1996).

⁸¹ GERALD L. CURTIS, *THE LOGIC OF JAPANESE POLITICS: LEADERS, INSTITUTIONS, AND THE LIMITS OF CHANGE I* (1999).

⁸² Curtis J. Milhaupt, *Is the U.S. Ready for FDI from China? Lessons from Japan's Experience in the 1980s*, in *INVESTING IN THE UNITED STATES: IS THE U.S. READY FOR FDI FROM CHINA?* 185 (Karl Sauvant, ed., 2009).

⁸³ S. George Georgiev, *The Reformed CFIUS Regulatory Framework: Mediating Between Continued Openness to Foreign Investment and National Security*, 25 YALE J. ON REG. 125, 126 (2008).

⁸⁴ For antitrust law, see, for example, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), touching on issues such as the anti-trust effect of predatory pricing conspiracy; for treaty interpretation, see, for example, *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176 (1982),

Fast forward two decades, the Chinese government has shown analogous signs of self-confidence, especially after the global financial crisis.⁸⁵ Having spent years learning from the West, high-ranking Chinese officials were suddenly awakened to the realization that “the teachers now have some problems.”⁸⁶ Further encouraged by its relative insulation from the global recession, some in China now zealously advocate development models that substantially depart from the Washington Consensus.⁸⁷ And a growing number of scholars have joined the enterprise of finding, constructing and debating a Beijing Consensus.⁸⁸

Whether Chinese investors set out to conquer the United States or adapt to the U.S. “rules of the game” hinges very much on their perceptions of the system. If confident about the efficacy of the Chinese ways of doing business, managing companies, interacting with government officials, and resolving disputes, Chinese investors will probably strive to maintain them, which will cause friction with the extant U.S. system. Conversely, if the Chinese investors view U.S. institutions positively, they should be less inclined to maintain their traditional practices and more willing to make necessary adjustments to satisfy the host environment. Part IV will provide some empirical evidence on these important issues.

2. Ability to Adapt: Decision-Making Power and Local Knowledge

In addition to the “desire to adapt,” the actual adaptation of Chinese investors to U.S. institutions also turns on their ability to do so, which I contend is determined by: (1) the allocation of corporate decision-making power, and (2) the access and use of professional knowledge.

Decision-making power is a critical factor because the Chinese investors, as sole or majority shareholders, are legally entitled to making all

about the legal identity of U.S. subsidiaries of foreign parents and treaty benefits, and *Taisei Fire & Marine Insurance Co. v. Commissioner*, 104 T.C. 535 (1995), clarifying the definition of permanent establishment in U.S. tax treaties.

⁸⁵ Barry Naughton, *China's Economy: Complacency, Crisis & The Challenge of Reform*, 143 DAEDALUS, J. AM. ACAD. ARTS & SCI. 14, 14 (2014).

⁸⁶ *When Fortune Frowned*, THE ECONOMIST (Oct. 9, 2008), <http://www.economist.com/node/12373696>.

⁸⁷ Barry Naughton, *China's Distinctive System: Can it be a Model for Others?*, 19 J. CONTEMP. CHINA 437, 437–40 (2010) [hereinafter Naughton, *China's Distinctive System*].

⁸⁸ For the debate about Beijing Consensus, see Suisheng Zhao, *The China Model: Can it Replace the Western Model of Modernization?* 19 J. CONTEMP. CHINA 419, 419–36 (2010); Matt Ferchen, *Whose China Model is it Anyway? The Contentious Search for Consensus*, 20 REV. INT'L POL. ECON. 390, 391–96 (2013). For those who question the duplicability of the Beijing model, see Naughton, *China's Distinctive System*, *supra* note 87 at 437; Scott Kennedy, *The Myth of the Beijing Consensus*, 19 J. CONTEMP. CHINA 461, 461–66 (2010). For those who argue against such a Beijing model, see Yang Jiang, *Rethinking the Beijing Consensus: How China Responds to Crises*, 24 PACIFIC REV. 337, 337–50 (2011); Yasheng Huang, *Rethinking the Beijing Consensus*, 11 ASIA POL'Y 1, 11–24 (2011).

major operation decisions regarding their U.S. investment.⁸⁹ Because the survey targets senior executives managing the U.S. businesses, we still need to know their de facto decision-making power within the corporate structure in order to connect the local desire to adapt (or lack thereof) with actual adaptive behavior. For instance, a Chinese firm's U.S. subsidiary may be inclined to make adjustments, but its hands are tied if all calls are made by the Chinese parent company that does not share the same aspirations.

Besides decision power allocation, the access and use of knowledge requisite for adaptation serves as another important component of the ability to adapt. The U.S. legal and regulatory systems are nothing but complex; it normally takes years of training and practice to build expertise in any field of U.S. law. Whether or not newly arrived Chinese investors can access and use the indigenous professional knowledge is central to their ability to adapt. This factor also relates to the allocation of corporate decision-making power because only effective incorporation of professional knowledge in U.S. operations will enable successful behavioral adaptation.

B. Are U.S. Institutions Vulnerable to Potential Threat from Chinese Investment?

Another important yet under-explored factor in the debate about Chinese business globalization and its implications is the level of vulnerability of U.S. institutions when exposed to Chinese investment. Though the U.S. government has been relatively open towards foreign investment, over time it has put in place certain counter-threat institutional measures.⁹⁰ Whether the perceived threats of Chinese investors will materialize, in case they refuse to adapt, depends to a great extent on the adequacy of these protective measures. Yet because the study of these measures—typically in the form of statutes and regulations—has been dominated by legal scholars, their effects have not been adequately addressed in the literature on Chinese business expansion. This article analyzes these under-explored issues in light of the recent landmark case *Ralls v. CFIUS*.

Moreover, the Chinese model of state capitalism may appear formidable given the growing power of the Chinese government in allocating resources and manipulating the market to achieve its policy objectives. Yet it is possible, as contended by a few scholars, that the Chinese model is as fragile as “Japan Inc.” and will eventually yield to the U.S. variant of capitalism. This study will investigate these important questions from an interdisciplinary perspective. Before proceeding to the

⁸⁹ See *infra* Figure 6.

⁹⁰ For example, the measures to protect against national security threats have been codified in the CFIUS process. See *infra* Part VI.A for more details.

detailed substantive analysis, however, the following Part III briefly introduces the survey research, its administration, and the validity of the survey results.

III. SURVEY DESIGN AND ADMINISTRATION

As noted in Part I, the studies on Chinese companies investing in the United States are limited in terms of methodology and scope. Most of the empirical research has so far relied on case studies⁹¹ or publicly available macro or firm-level data,⁹² causing potential biases in the findings that weaken or even undercut the theories induced therefrom. Moreover, most scholars focus on a narrow area of the debate, ignoring the apparent cross-disciplinary nature of the issues bearing on Chinese direct investment in the United States. To fully assess their potential threats necessitates better understanding of not only the Chinese companies, but also the U.S. institutions exposed to the impact and the measures designed to prevent or ameliorate critical threats.

As noted earlier, this Article fills the gaps by combining a comprehensive survey of Chinese investors in the United States with the analysis of relevant institutions such as the CFIUS review. This Part III provides a brief description of the design, administration and validity of the survey.

A. The Survey Design

The survey was conducted in 2014 by a major non-profit business association of Chinese companies investing in the United States (the "Association"). The Association was planning to publish a year-end white paper and contemplated including some survey data. The author participated as an independent academic advisor for the survey project, and from time to time provided advice on the design and administration of the survey and the analysis of its results. The author received no compensation from the Association or any of its affiliated parties.

The survey includes 128 questions in sixteen sections, covering a broad range of topics such as general business features of the responding company and perceptions of the U.S. business, legal and political systems.⁹³

⁹¹ Xiaohua Yang et al., *Internationalization of Chinese and Korean Firms*, 51 THUNDERBIRD INT'L BUS. REV. 37, 38 (2009). For a few examples of such studies, see, for example, Yang et al., *supra* note 41, at 156; Deng, *supra* note 58, at 410.

⁹² See, e.g., Buckley et al., *supra* note 45, at 499; Ramasamy et al., *supra* note 45, at 18.

⁹³ The sixteen sections include the following: (1) Basic Information of the Firm; (2) Information about U.S. Business; (3) Trend of Business in the United States; (4) Evaluations on U.S. Business Environment; (5) Challenges to the Company; (6) Mergers and Acquisitions; (7) Legal and Compliance; (8) Dispute Resolution; (9) Human Resources; (10) Investment Protection; (11) National Security

The questions originated from three major sources. First, a portion of them were taken out of internal surveys from previous years.⁹⁴ Second, some of the questions were added to address the major issues currently confronting Chinese firms that have already invested in the United States. Third, additional questions were inserted pertaining to the long-term performance of Chinese invested businesses and their interactions with U.S. institutions.

A pilot study of the survey was conducted in June to evaluate the draft questions,⁹⁵ and the subsequent revised draft was reviewed by an executive director of the Association, whose comments were partially reflected in the final version. To ensure truthfulness and accuracy, the survey was conducted anonymously.⁹⁶ The survey questionnaires were completed by senior executives in management positions. Anticipating some of them to speak less-than-perfect English, all of the survey questions were prepared in simplified Chinese.

B. The Administration of the Survey

The survey questionnaires were distributed in multiple ways. First, to ensure the responses derived from a diverse body of major Chinese investors in the United States, the questionnaires were target-distributed to all board members of the Association and its local chapters. Most of the members completed and returned the survey by the end of August 2014. Second, one of the executive directors of the Association conducted interviews with a few dozen Chinese investors and requested the interviewees to complete the survey questionnaires. Most of them timely returned completed questionnaires.

The survey results were compiled by Association staff other than the interviewing director. The director did not access the aggregated data, nor was he informed about it, until the drafting of the white paper began. This division of labor helped avoid possible feedback bias from the interviewer. In addition, objectiveness and neutrality were emphasized repeatedly before and during the survey process.

Third, approximately 200 surveys were mass-distributed to other members of the Association. A staff of the Association kept track of the

Review and Anti-trust; (12) Tax; (13) Government Approval and Others; (14) Intellectual Property; (15) Contributions to the United States; (16) About the Association. Another participant in the survey added a few questions about intellectual property at the end of the survey after most of the results had been received. These questions would not be included in this study.

⁹⁴ Only about thirty responses were received from the last year's survey. The results were only published in an internal circulation.

⁹⁵ The pilot study indicated that approximately thirty to forty minutes were needed to finish all of the questions.

⁹⁶ In addition, those who were concerned about confidentiality were instructed to simply skip any question that made them uncomfortable.

distribution and followed up with emails and phone calls to remind the Chinese investors to complete the questionnaires, yet as expected, not many responded.

C. Validity of the Survey Results

By October 2014, 101 responses had been received. Note that a random sample of all Chinese companies investing in the United States was *not* intended for the survey. For purposes of this study, the survey targeted a diverse group of medium to large-sized Chinese investors whose business expansion has significant or potentially significant impacts on the U.S. market. A take-out restaurant in New York City owned and operated by a Chinese family is not germane to this research, though a random sample of Chinese investors in the United States will certainly include many such small businesses. In other words, it is reasonable to assume that when people debate about the threats of Chinese economic expansion, they have in mind large multinational corporations, not Chinese-invested take-out restaurants or laundromats, which certainly account for a large number of Chinese investments in the United States.

The survey respondents comprise a diverse group of medium and large-sized Chinese investors in the United States. Their diversity is assured by the high response rate from the board members of the Association and its local chapters, and the managers whom the director interviewed. The Association's practice has been to nominate sizable Chinese companies of different sectors, locations, corporate structure, and ownership to lead the board and the local chapters. As illustrated by the data below, the sample exhibits a great diversity.

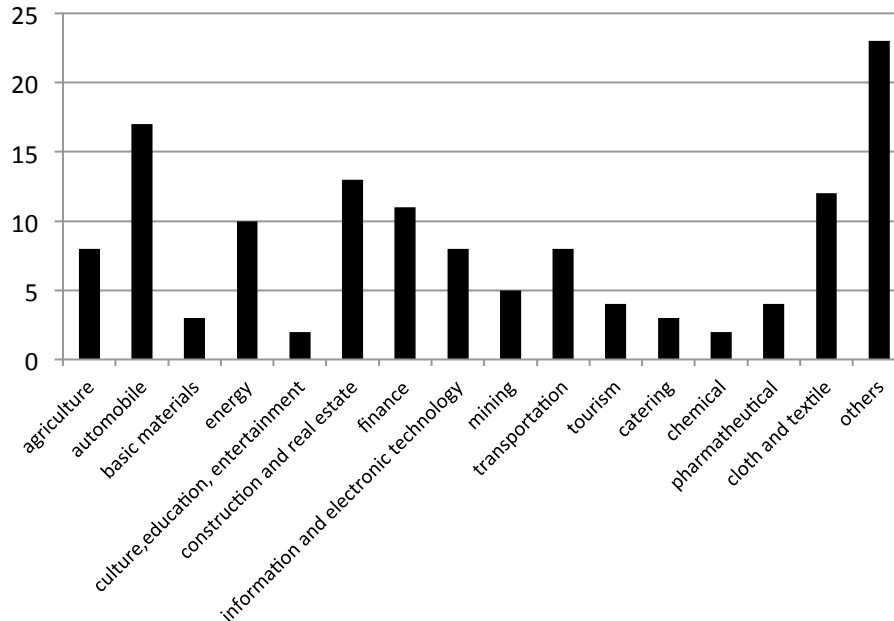
First, as shown in Figure 4, the respondents vary in terms of their sectoral background. As many as seventeen reported to have business in the auto industry. Thirteen of the respondents operate in construction and real estate. The textile industry, closely followed by finance and energy, also attracts sizable groups of Chinese investors. Eight respondents have investments in both agriculture and information and electronic technology.⁹⁷

In line with the general trend of FDI outflows from China, most of the surveyed Chinese investors entered the U.S. market in the past decade. But a sizable portion of the respondents started their investment twenty or thirty years ago, which is attributable to the high percentage of SOEs in the survey sample, as the Chinese government allowed only large central and provincial trading companies to operate abroad before 1990.⁹⁸

⁹⁷ Twenty-three respondents conduct business in a sector not specified in the survey.

⁹⁸ Yang et al., *supra* note 41, at 138.

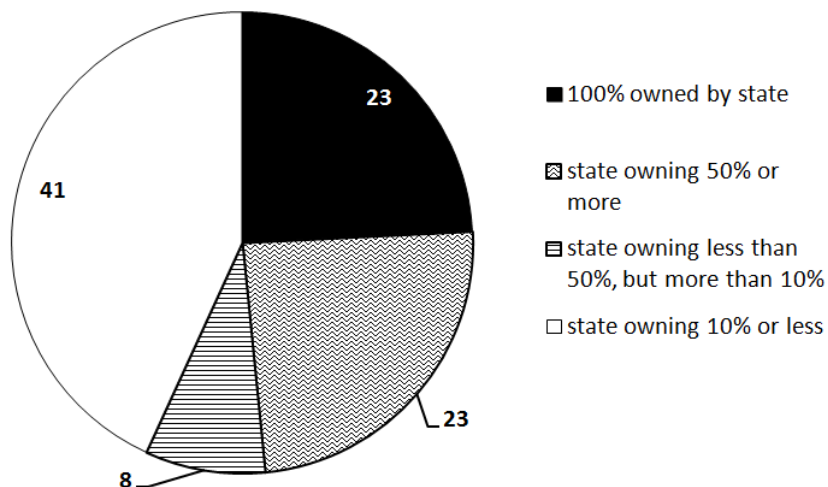
Figure 4: Sectoral Distribution of Survey Respondents



The survey respondents are diverse in terms of ownership character (See Figure 5). 35% of the respondents reported their investors to be completely private companies (with no state ownership). But state-ownership is well represented; 27% of the respondents belong to Chinese investors that are wholly owned by the Chinese government. Additionally, 23% report the state as the majority shareholder, and 7% have the state owning less than 50% but more than 10%. The distribution of ownership evidences the dominance of SOEs or their subsidiaries of Chinese FDI in the United States in terms of value.⁹⁹ The high percentage of SOEs in the sample serves well the purposes of this study, as much of the debate about Chinese investments concerns the outbound expansion of the state sector and state capitalism.

⁹⁹ SZAMOSSZEGI, *supra* note 20, at 22.

Figure 5: Ownership Structure of the Chinese Investors

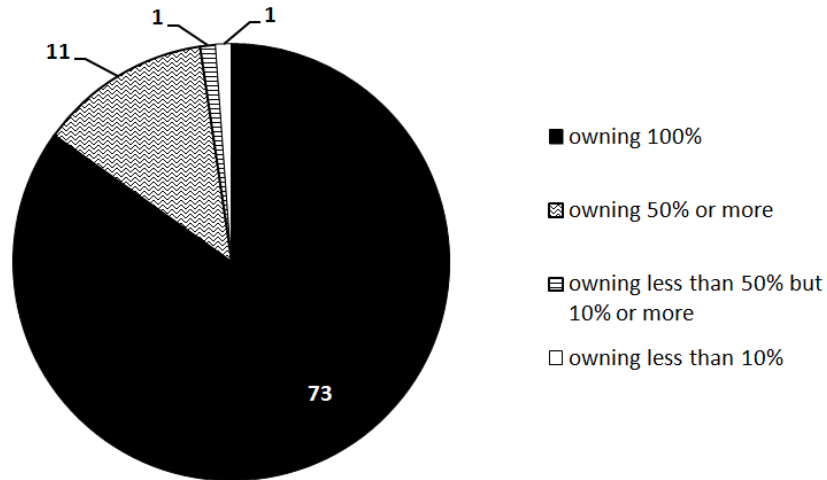


In terms of ownership structure, the overwhelming majority of the survey respondents are 100% owned by their Chinese investors, and another 12% of the respondents report Chinese investors owning the majority interest (See Figure 6). It is worth emphasizing once again that the sample does not constitute a random representation of all Chinese investments in the United States, and portfolio investors are largely absent.¹⁰⁰ Portfolio investors that are passive holders of U.S. interests tend not to be viewed as a critical threat, as evidenced by their exclusion from the national security review of foreign acquisition of U.S. assets.¹⁰¹

¹⁰⁰ Portfolio investment refers to the holding of interest or share of less than 10% of the invested entity.

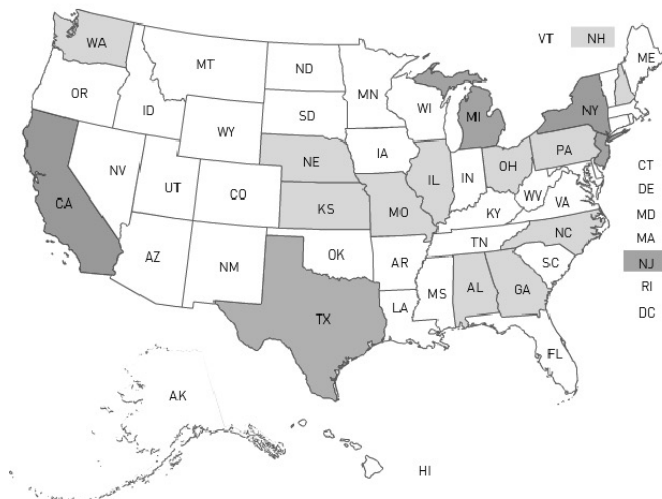
¹⁰¹ Part 800 - Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons, 31 C.F.R. § 800.302(b) (2016).

Figure 6: Ownership Structure of the U.S. Investment



Moreover, the survey respondents hold investments in diverse locations (See Figure 7). California stands out as the most popular state for Chinese investors. New York, Michigan, New Jersey and Texas, in decreasing order of popularity, also attract fair amounts of Chinese investments. At least twelve other states each has a Chinese investor responding to the survey.

Figure 7: Location Choice by Chinese Investors



In sum, this study moves a major step forward by using a comprehensive survey targeting medium and large-sized Chinese investors in the United States that fall squarely under the spotlight of the ongoing debate about China's global business expansion and its implications. The sample of respondents represents a diverse group, and various measures were undertaken to ensure the objectiveness, accuracy, and truthfulness of the survey results. That being said, a word of caution is in order.

Despite the care taken to ensure its quality, this survey cannot avoid some of the problems common to all survey-based research. First, the nonresponse problem from allowing respondents to skip questions that made them uncomfortable, which essentially reflects the tradeoff between receiving as many responses as possible and getting truthful but fewer responses. The missing data inevitably have a biasing effect on the survey results. Second, certain objective and subjective factors may systemically affect how the respondents answer the questionnaires. For instance, managers of SOE investments in the United States may intentionally or subconsciously align their responses to the perceived dominant party line. Such issues and their effect on the survey results will be discussed in more detail when specific data are presented and analyzed in following Part IV.

IV. FINDINGS AND ANALYSIS OF THE SURVEY STUDY

Before proceeding to the in-depth discussion, this section begins with a quick summary of the survey findings. First, preliminary results generally support the view that China's business expansion is unlikely to pose a critical threat to U.S. institutions in the next decade. Most Chinese companies appear to fall into Quadrant IV of the two-by-two matrix (See Figure 3), and therefore are adapting to the host country environment and are basically "playing our game."¹⁰² To be more specific, the investors are mostly motivated by commercial interests; they perceive the U.S. system positively and are aware of their lack of local knowledge, so in adapting to the new environment the Chinese investors rely heavily on professionals and local talent. In contrast to Japanese companies that transplanted the traditional business model to their U.S. investments in the 1980s,¹⁰³ many Chinese investors seem willing and ready to make necessary adjustments. As a result, the Chinese investors act like their local competitors in the sophisticated U.S. market and the complex U.S. regulatory system.

¹⁰² STEINFELD, *supra* note 5, at 18.

¹⁰³ Yang et al., *supra* note 41, at 141; Eileen M. Mullen, Note, *Rotating Japanese Managers in American Subsidiaries of Japanese Firms: A Challenge for American Employment Discrimination Law*, 45 STAN. L. REV. 725, 725-31 (1992).

A. The Desire of Chinese Investors to Adapt to U.S. Institutions

1. *Motives of Chinese Investment in the United States*

As discussed in Part II, investment motives form a key part of the desire to adapt. Are Chinese investments in the United States driven by political concerns of the Chinese government or commercial interests of profit-seeking enterprises? Investments motivated by Chinese state policies and political factors are apparently more suspicious to U.S. policymakers. Chinese SOEs, as well as private Chinese companies with colorable government connections, inevitably draw heightened scrutiny when venturing abroad. Illustrative examples include CNOOC's failed bid for UNOCAL and CFIUS's demand for Huawei, a private Chinese company founded by a former army engineer,¹⁰⁴ to divest from 3Leaf, a U.S. company whose core assets constitute patents worth merely \$2 million.¹⁰⁵

Presumably, Chinese investors closely following the government's order to "go global" would be less sensitive to the distinct features of U.S. institutions and less inclined to adjust. By comparison, Chinese investors attracted solely by the U.S. market and other business considerations should respond to incentive mechanisms in ways similar to their American competitors. Everything else being equal, they will desire to adapt as long as doing so makes commercial sense. In other words, it is more likely for the U.S. regulatory and legal frameworks to be effective in regulating Chinese investors who share the same set of motives as domestic U.S. companies, since they are mostly designed to shape the behavior of rational business actors in a market economy.

Scholars are at odds on the investment motives of Chinese companies. Some portray the Chinese government as a puppeteer pulling strings of outbound investments.¹⁰⁶ Under this account, investment decisions are driven primarily by government policies, not by business concerns.¹⁰⁷ Others, while acknowledging that the rather distinct state-business relations in China may distort investment motives, contend that years of reforms have, by and large, commercialized Chinese SOEs.¹⁰⁸ Moreover, the lack of

¹⁰⁴ David Barboza, *China Telecom Giant, Thwarted in U.S. Deals, Seeks Inquiry to Clear Name*, N.Y. TIMES (Feb. 25, 2011), <http://www.nytimes.com/2011/02/26/technology/26huawei.html>.

¹⁰⁵ Shayndi Raice & Andrew Dowell, *Huawei Drops U.S. Deal Amid Opposition*, WALL ST. J. (Feb. 22, 2011), <http://online.wsj.com/articles/SB10001424052748703407304576154121951088478>.

¹⁰⁶ For a summary of this camp of scholars, see J. M. F. Blanchard, *Chinese MNCs as China's New Long March: A Review and Critique of the Western Literature*, 16 J. CHINESE POL. SCI. 91, 95 (2011).

¹⁰⁷ See, e.g., Mark Yaolin Wang, *The Motivations Behind China's Government-Initiated Industrial Investments Overseas*, 75 PAC. AFF. 187, 189 (2002); SZAMOSZEGI, *supra* note 20, at 29.

¹⁰⁸ See, e.g., STEINFELD, *supra* note 5, at 49–59; ERICA DOWNS, *INSIDE CHINA, INC: CHINA DEVELOPMENT BANK'S CROSS-BORDER ENERGY DEALS 2–5* (John L. Thornton China Ctr. at Brookings Inst. 2011).

effective central state control also contributes to corporate autonomy of the SOEs' foreign subsidiaries.¹⁰⁹ Thus, one may infer that in spite of the delicate balancing between state policy interests and corporate commercial interests, most Chinese SOEs are profit-driven most of the time, resulting in their mindful and keen adaptation to host country institutions.

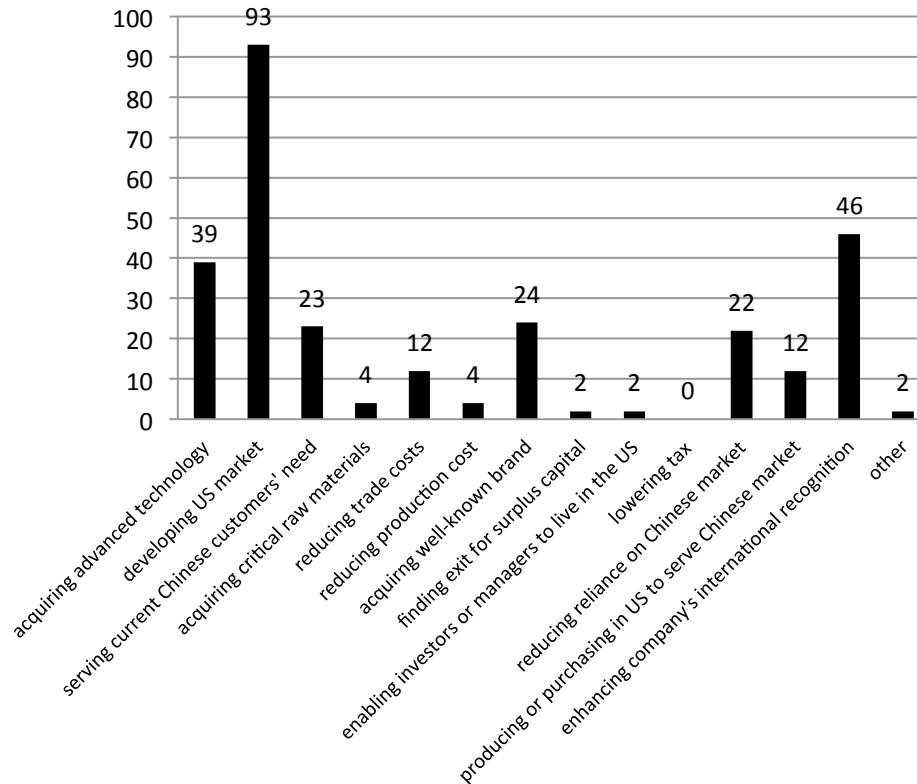
This survey-based study adds a valuable empirical angle to this ongoing debate. The preliminary survey results indicate Chinese investors in the United States are mostly driven by commercial incentives. The responding companies invested in the United States mainly for its huge market, advanced technologies, and brand enhancement.¹¹⁰ Gaining control over natural resources, the incentive that has received extensive international media coverage, appears to play a negligible role in the decisions to expand into the United States. Moreover, the finding does not bear out the popular view that cash-rich Chinese investors are making profligate acquisitions in the United States, given that only two survey respondents invested in order to find an exit for surplus capital at home (See Figure 8). In addition, two companies made investments to lower trade costs. This differentiates Chinese investors from their Japanese counterparts in the 1980s that were driven by, inter alia, trade conflicts and the forced appreciation of yen.¹¹¹

¹⁰⁹ Antoine Kernen & Katy N. Lam, *Workforce Localization among Chinese State-Owned Enterprises (SOEs) in Ghana*, 23 J. CONTEMP. CHINA 1053 (2014).

¹¹⁰ This is consistent with the findings from the studies of overall Chinese FDI. See, e.g., Agyenim Boateng et al., *Cross-Border M&As by Chinese Firms: An Analysis of Strategic Motives and Performance*, 50 THUNDERBIRD INT'L BUS. REV. 259, 259 (2008).

¹¹¹ Young-Kwan Yoon, *The Political Economy of Transition: Japanese Foreign Direct Investments in the 1980s*, WORLD POL., Oct. 1990, at 14. These companies were concentrated in certain sectors such as steel and solar panel where significant trade barriers exist. Jean-Francois Hennart & Young-Ryeol Park, *Location, Governance, and Strategic Determinants of Japanese Manufacturing Investment in the United States*, 15 STRATEGIC MGMT. J. 419, 428–30 (1994).

Figure 8: Motives for Investing in the United States



Moreover, the survey results partially explain the clustering of Chinese investment in the United States, a phenomenon previous studies have largely overlooked.¹¹² Twenty-three companies selected “meeting the needs of current Chinese customers to grow in the United States” as a reason for their entry into the U.S. market. Furthermore, the survey results do not affirm the view that personal preferences of individual investors or senior managers motivated business expansion in the United States, for only two responding companies took the plunge due to the immigration intent of their investors or managers.¹¹³ Though a large number of wealthy Chinese invest in the United States to obtain permanent residency,¹¹⁴ most of these

¹¹² One study notes that Chinese SOEs are unlike Japanese keiretsu in exhibiting the clustering effect in FDI. See Yang et al., *supra* note 41, at 157.

¹¹³ They can do so through obtaining L1 visa or permanent residency via EB-5.

¹¹⁴ Alana Semuels, *Should Congress Let Wealthy Foreigners Buy Green Cards?* THE ATLANTIC (Sep. 21, 2015), <http://www.theatlantic.com/business/archive/2015/09/should-congress-let-wealthy->

investors keep their primary business in China,¹¹⁵ so their profiles did not feature prominently in the survey.

Furthermore, the survey results shed light on the effect of the Chinese government's "go global" policies. As noted, China has been actively promoting the expansion of Chinese companies abroad in the past decade. Over time, it has adopted a series of policies to encourage outbound investment, and several studies highlight the influence of such state intervention.¹¹⁶ The survey results, however, indicate that the government's incentives play, at best, an indirect role in the Chinese companies' decisions to enter the U.S. market. To those Chinese investors that conducted M&A in the United States, only seven selected Chinese government policy as having influenced their decisions. Of course, the Chinese government policies generally reflect the rationales listed in the survey, *e.g.*, gaining U.S. market share or famous brands,¹¹⁷ so these findings cannot rule out indirect influence of the policies. But they certainly indicate that Beijing either lacks the capacity of, or chooses to refrain from, micro-managing cross-border business transactions of Chinese companies.¹¹⁸

Commercial motives are also evident in the investors' location choice. In response to the survey question, sixty picked "proximity to major clients" as an important consideration. Thirty-one chose convenient transportation as a key factor. Twenty-eight respondents considered the location in big cities to be important for enhancing the investors' global profile. In addition, high quality employee pool, proximity to major suppliers, and fine infrastructure were considered important by seventeen, sixteen, and fifteen respondents respectively.

Indirectly, the commercial motivation of Chinese investments is also evidenced by their profit rates. Unlike policy-driven investors that often assume or tolerate higher losses, at least in the short term, the respondents report profits comparable to those from their investments elsewhere. 38% of the respondents found their U.S. profits to be on par with their global

foreigners-buy-citizenship/406432/; Frank Shyong, *Visa Program for Wealthy Investors Maxed Out by Chinese Demand*, L.A. TIMES (Aug. 29, 2014), <http://www.latimes.com/local/la-me-0830-chinese-visas-20140830-story.html>.

¹¹⁵ *Id.* ("Most of the people who want to do this are wealthy and they're doing it for their kids"); *Zhongguo Yicheng Duoguo Zhuyao Yimin Laiyuanguo Disanbo Yiminchao Yonglai* [China Became Major Source of Immigrants for Several Countries, Arrives the Third Wave of Immigration] (中国已成多国主要移民来源国 第三波移民潮涌来), CHINESE YOUTH (中国青年报) (Sept. 22, 2014), http://news.xinhuanet.com/politics/2014-09/22/c_1112566061.htm.

¹¹⁶ Buckley et al., *supra* note 45; Quer et al., *supra* note 46, at 1089; Alessia A. Amighini et al., *Do Chinese State-Owned and Private Enterprises Differ in their Internationalization Strategies?* 27 CHINA ECON. REV. 312, 320 (2013).

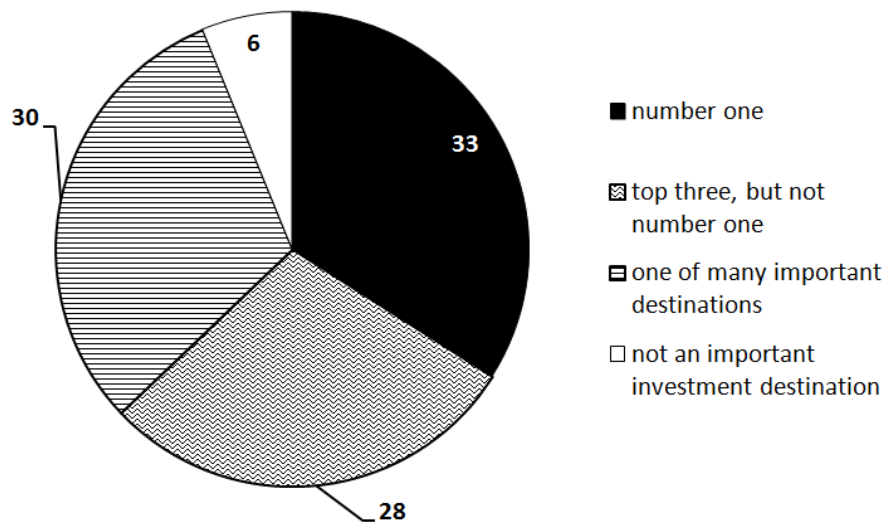
¹¹⁷ SZAMOSSZEGI, *supra* note 20, 22–23.

¹¹⁸ Here, the issue of bias mentioned in Part III does not appear to be significant, because to stay in line with the Chinese government's policy, the respondents would have chosen "government policy" as a major explanation for them to invest in the United States.

profits. 25% reported U.S. profits higher than global profits, and the same percentage of respondents had lower U.S. profits. In addition, 90% of the respondents reported increasing or steady revenue in 2013, and about half made even or a profit.¹¹⁹

The survey results also indicate that Chinese investments in the United States will continue to grow. 33% of the companies ranked the U.S. market as the top destination for their global investment for the near future, and another 28% ranked it as a top three (See Figure 9). Only 6% companies marked the United States as not an important investment destination. In addition, most of the Chinese investors were satisfied with their U.S. investment (only seven expressed dissatisfaction in the survey). Probably as a result of self-selection, 76% of the respondents were optimistic about their U.S. business in the next three to five years.

Figure 9: Ranking the United States in Short-Term Global Investment Destinations



¹¹⁹ One may be concerned that the SOE managers systemically under or over-report their profit levels in the United States. It is possible; but if it is indeed the case, we should observe a distribution of the responses to be either left-skewed or right-skewed. Both distributions are of a normal shape, suggesting that misreporting is not a systemic issue here.

2. *Perceptions of U.S. Business, Legal, and Political Institutions*

Besides investment motives, perceptions should also play an important role in determining Chinese investors' desire to adapt to a host country's environment. Presumably, the investors will be more inclined to make radical adjustments if they perceive U.S. institutions positively. As noted earlier, the confidence of Japanese investors in their own business model likely contributed to the reluctance to adapt in the 1980s.¹²⁰ Similarly, the Chinese ruling elites have demonstrated growing confidence, especially after the global financial crisis.¹²¹ Do Chinese investors share the self-confidence and therefore hesitate about adapting to U.S. institutions? The survey results provide first-hand information on this important subjective question that has been largely neglected in previous studies.

(a) The U.S. Social and Political System

Let us begin with how Chinese investors view the U.S. social and political system. As noted earlier, several major events in the past few years have had detrimental effect on the reputation of basic U.S. institutions. To many, the global financial crisis revealed the flaws and dire consequences of loose government regulations that reflected the deep-rooted faith in the self-discipline and efficiency of free market capitalism.¹²² The subsequent government intervention in economic restructuring at both the federal and state level further justified the argument that government ought to play a more proactive role in regulating the economy. Yet at the moment effective governance became imperative, the world instead observed political paralysis in Washington, D.C.¹²³

The Chinese official media has not spared the United States of negative publicity. American politics has been portrayed as conservative, chaotic, and U.S.-centered,¹²⁴ and as signaling the decay of Western

¹²⁰ See the discussion *supra* Part II.A.1.b.

¹²¹ Barry Naughton, *China's Economy: Complacency, Crisis & the Challenge of Reform*, *supra* note 85.

¹²² See, e.g., RICHARD A. POSNER, *A FAILURE OF CAPITALISM: THE CRISIS OF '08 AND THE DESCENT INTO DEPRESSION* (2009).

¹²³ See, e.g., Palash Ghosh, *Government Shutdown 2013: How Foreign Media Sees The Debacle in Washington*, INT'L BUS. TIMES (Oct. 12, 2013), <http://www.ibtimes.com/government-shutdown-2013-how-foreign-media-sees-debacle-washington-1425068>; Keiko Ujikane, *Biggest US Foreign Creditors Show Concern on Default Risk*, BLOOMBERG (Oct. 8, 2013), <http://www.bloomberg.com/news/2013-10-08/japan-aso-warns-on-effect-of-any-u-s-default-on-reserves-value.html>.

¹²⁴ See, e.g., *Meiguo Zhengfu Guanmen: Qiandaishang de Duikang* (美国政府关门: 钱袋上的对抗) [*American Government Shut Down, A Fight for Money*], XIN JING BAO (新京报) (Oct. 19, 2013), http://news.xinhuanet.com/world/2013-10/19/c_117783388.htm; *Meiguo Lianbang Zhengfu Guanmen Fengbo Shuoming Shenmo* (美国联邦政府关门风波说明什么?) [*What Does the US Government Shutdown Tell Us?*], GUANGMINGWANG (光明网) (Oct. 28, 2013),

democracy.¹²⁵ At the same time, the state media advocates that the Chinese system, characterized by political stability, social harmony, and sustained economic development, provides a desirable alternative to the U.S. institutions.¹²⁶ The question pertinent to this study is whether Chinese investors have internalized this rhetoric and become advocates and practitioners of the Chinese model when they invest in the United States.

As demonstrated below, the survey findings indicate quite the opposite. Chinese investors share highly positive views of U.S. social and political systems. 75% of the respondents view the U.S. political system to be stable or very stable, in contrast with only 2% who considered it to be unstable.¹²⁷ Likewise, on the question about social openness and inclusiveness, only 2% expressed a negative view. The perception is even more positive when it comes to social fairness, as merely 1% of the respondents thought the United States to be an unfair society. In addition, Chinese investors admire the United States for its capacity to innovate, with 95% of the respondents considering the society to be innovative or highly innovative.¹²⁸

http://www.gmw.cn/xueshu/2013-10/28/content_9305492.htm.

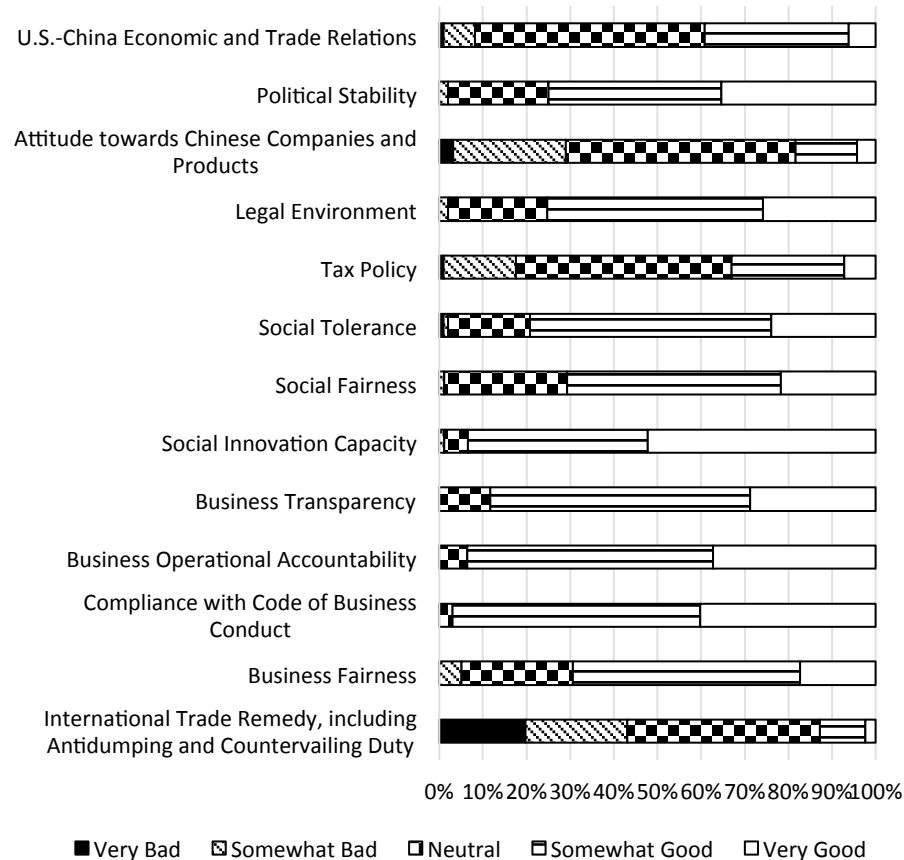
¹²⁵ *Touxi Meiguo Zhengfu Guanmen Fengbo (透析美国政府关门风波)* [Analysis of American Government Shutdown], QIUSHILILUNWANG (求是理论网) (Sept. 18, 2013), http://www.qstheory.cn/zs/201310/t20131023_281996.htm.

¹²⁶ Sun Tiexiang et al., *Zhidu Zixin Zhigen Zhongguo (制度自信 植根中国)* [Confidence in Chinese Institutions], XINHUANET (新华网) (Sept. 16, 2014), http://news.xinhuanet.com/2014-09/16/c_1112498276.htm; Xie Yahong et al., *Hao Zhidu Rang Zhongguo Anding Youxu Chongman Huoli (好制度让中国安定有序充满活力)*, [Good Institutions Stabilize and Energize China], PEOPLE'S DAILY (Sept. 7, 2014), <http://world.people.com.cn/n/2014/0907/c1002-25617441.html>.

¹²⁷ In a range of 1 to 5, 1 being very unstable, and 5 very stable, 98% chose 3 and above.

¹²⁸ Here, systemic bias due to political concerns of the SOE managers, if any, would have been reflected in more negative views of U.S. institutions, provided the Chinese government official rhetoric desecrating the Western system. The survey results show quite the opposite.

Figure 10: Perceptions of Extant US Institutions



(b) The U.S. Business Environment

Chinese business environment differs from that of the United States. It is conceivable that Chinese managers, having successfully built multinational enterprises large enough to invest in the United States, have gained ample confidence in the efficacy of their time-honored way of doing business, regardless of the context. If so, they would be reluctant to engage in any substantial behavioral adjustment after investing in the United States and continue to transact in the Chinese way. To address these questions, the survey inquired about the Chinese investors' perceptions of the U.S. business environment.

Again, the Chinese investors expressed highly positive views. 91% of

the respondents considered business transactions and conduct of American firms to be transparent or highly transparent. The percentage is even higher (94%) for the perception of Chinese investors about business ethics in the United States. And on the question about compliance with the code of business conduct, 98% of the respondents considered U.S. companies to be in good standing.

Because the Chinese media occasionally portrayed the United States as being hostile towards Chinese investors, citing cases such as CNOOC's failed bid for UNOCAL and the blockage of Huawei from the U.S. market, the survey included several questions to assess the views of Chinese investors on equality in U.S. business environment, *i.e.*, no discriminatory treatment of foreign companies, customers or investors. Only 5% of the respondents felt unfairly treated, and 26% expressed a neutral view, compared to 69% who saw the U.S. business environment to be equal or highly equal.¹²⁹

(c) The U.S. Legal System

Another major institutional difference between China and the United States resides in judicial independence and authority. While in the United States courts are recognized as a pillar of the political system separate and independent of the legislature and the executive branches, courts in China are heavily controlled by the party state.¹³⁰ Hence, law enforcement in China is often contingent on the power distribution of the stakeholders.¹³¹ In response, Chinese firms rely more often on informal institutions such as personal connections,¹³² and regulations and laws are frequently evaded, neglected, or treated as mere costs of doing business.¹³³

It is plausible that Chinese companies, when expanding abroad, carry the attitude towards law and courts with them, as illustrated by anecdotal reports of Chinese investors violating labor rights, disregarding environmental protection law, and bribing officials.¹³⁴ The issue is

¹²⁹ Again, party line bias would have been reflected in more negative views. So the results suggest that the bias, if any, is limited for this specific set of questions.

¹³⁰ Benjamin L. Liebman, *China's Courts: Restricted Reform*, 191 THE CHINA Q. 620, 620 (2007); Ji Li, *Dare You Sue the Tax Collector? An Empirical Study of Tax-Related Administrative Lawsuits Against Tax Agencies in China*, 23 PAC. RIM L. & POL'Y J. 57, 69 (2014).

¹³¹ Ji Li, *Does Law Matter in China? An Empirical Study of a Limiting Case*, 46 GEO. WASH. INT'L L. REV. 119, 155–56 (2014).

¹³² Katherine K. Xin & Jone L. Pearce, *Guanxi: Connections as Substitutes for Formal Institutional Support*, 39 ACAD. MGMT. J. 1641, 1654 (1996).

¹³³ See generally BENJAMIN VAN ROOIJ, *REGULATING LAND AND POLLUTION IN CHINA: LAWMAKING, COMPLIANCE, AND ENFORCEMENT; THEORY AND CASES* (2006).

¹³⁴ Alfred Atakora et al., *Globalization and Emergent Africa-Asia Dialogue: The Good, the Bad and the Ugly*, 7 AFR. J. BUS. MGMT. 3694, 3697 (2013); Angela Dziedzom Akorsu & Fang Lee Cooke,

important for understanding their adaptation, as the reading of U.S. law and courts to be corrupt or systemically biased will presumably affect the investors' compliance inclination.

The survey included a number of questions addressing this issue. Unsurprisingly, many respondents considered formal U.S. laws to be complex and confusing (29%). But the perception does not appear to affect the generally positive view held by the Chinese investors about the sensibility of U.S. law. We asked their opinions about U.S. tax law, well known to be the most complex substantive law, in comparison to Chinese tax law. Only 2% of the respondents considered U.S. tax law to be more unreasonable than Chinese tax rules. Though the majority held a neutral view, 46% of the respondents thought U.S. tax law to be more reasonable. This result is remarkable considering that only 3% of the respondents thought U.S. tax burden to be less than in China and 63% considered their U.S. tax liabilities to be either heavier or much heavier than their Chinese taxes.

While Chinese firms tend to distrust the courts and arrange their business under informal institutions¹³⁵ or use biased judges to gain favors,¹³⁶ those that have invested in the United States shared a generally positive view of the U.S. judiciary. 51% of the respondents considered U.S. courts to be fair or very fair. 46% held neutral opinions and merely 3% of the respondents saw U.S. courts as unfair.

In strong contrast to the favorable views of U.S. business, political and legal environments, the respondents reacted negatively to questions about several specific issues. Only 11% of the Chinese investors considered the enforcement of anti-dumping and countervailing duty rules to be reasonable. 46% of the respondents were neutral, and 42% considered them unreasonable or highly unreasonable. On the question about CFIUS review, 43% of Chinese companies expressed lack of knowledge, and 43% considered the process to be politically charged. Only 13% expressed a positive view. These results are probably reactions to the highly arbitrary nature of these measures.¹³⁷ On the attitude of U.S. Congress towards Chinese companies and products, 30% of the respondents chose "unfair" or "highly unfair", 53% held a neutral view, and merely 16% expressed positive opinions.

Labour Standards Application among Chinese and Indian Firms in Ghana: Typical or Atypical? 22 INT'L J. HUM. RES. MGMT. 2730, 2730 (2011).

¹³⁵ Katherine K. Xin & Jone L. Pearce, *Guanxi: Connections as Substitutes for Formal Institutional Support*, 39 ACAD. MGMT. J. 1641, 1641–42 (1996).

¹³⁶ Yuen Yuen Ang & Nan Jia, *Perverse Complementarity: Political Connections and the Use of Courts among Private Firms in China*, 76 J. POL. 318, 318 (2014).

¹³⁷ For the arbitrariness of U.S. antidumping measures, see Mark Wu, *Antidumping in Asia's Emerging Giants*, 53 HARV. INT'L L.J. 2 (2012). For more discussion about the CFIUS review process, see *infra* Part VI.A.

Such relatively negative views, however, do not reflect the general impression of Chinese investors about public administration in the United States. When asked to compare government review and approval procedures of the United States with China, 60% of the respondents found the burden to be less in the United States, and only 12% considered the procedures to be slightly more cumbersome. Moreover, 66% of the Chinese investors considered the procedures in the United States to be more transparent than in China, on which only 5% disagreed. Moreover, negative perceptions of the federal agencies and procedures are not unique for the Chinese investors; American public shares similar views. Most would endorse the fundamental political regime but be critical about the administration, especially at the federal level.¹³⁸

In sum, despite its relative economic decline, the United States still enjoys enormous “soft power,” a term coined by Joseph Nye to mean the ability of a country to “get other countries to want what it wants.”¹³⁹ The survey results demonstrates that commercially-motivated Chinese investors perceive the U.S. political, business, and legal systems positively, which sets the stage for quick adaptation of Chinese companies to the U.S. “rules of the game.” Part V will elaborate with more details of the actual adaptation.

B. The Ability to Adapt to U.S. Institutions

The second variable for investment adaptation is the ability to adapt. As noted earlier, the ability to adapt varies in accordance with the allocation of decision-making power in the investor’s corporate structure, and the access and use of knowledge requisite for adaptation.

1. The Allocation of Decision-Making Power

As noted, 68% of the respondents reported that their Chinese investors held 100% of the interests in the U.S. investment, and another 11% held less than 100% but more than 50% of the interests in the U.S. business (See Figure 6). Only 6% held minority interests. The majority ownership should entitle the Chinese parents to absolute legal control over the operation of their U.S. subsidiaries. Yet on the other hand, it will be costly and inefficient for the Chinese investors to dictate their U.S. operations given the differences between the two markets. For our study, the decision-making power allocation is important because decisions of the Chinese

¹³⁸ A recent survey indicates that only 24% of American citizens trust the federal government. See Public Trust in Government: 1958–2014, PEW RESEARCH CTR. (Nov. 13, 2014), <http://www.people-press.org/2014/11/13/public-trust-in-government/>.

¹³⁹ Joseph S. Nye, *Soft Power*, 80 FOREIGN POL’Y 153, 166 (1990).

parents presumably reflect more of the Chinese political, business, and legal contexts, not the desire of the local subsidiaries, if any, to adapt to U.S. institutions.¹⁴⁰

Since it is difficult to gauge accurately how decision-making power (a broad and nebulous term) is allocated between the executives of the Chinese parents and their U.S. subsidiaries or branches, this study focuses on a proxy variable, i.e., the specific power to decide on important personnel matters concerning the U.S. operations that is at the center of corporate management power. 13% of the Chinese respondents reported that their parent Chinese companies made all-important personnel decisions for the U.S. business. And another 33% reported that the Chinese headquarters made the decisions, but based on consultation with local managers. Among the rest, in 34% of the cases the local managers made the personnel decisions for the U.S. business, after consulting with the Chinese headquarters, and 17% reported the U.S. managers to have full authority over personnel decisions for the U.S. operation. In a nutshell, the odds favor the executives stationed in the United States to decide key issues concerning the U.S. investments, though the gap is rather small (51% v. 46%).¹⁴¹ In addition, unlike the rank-and-file staff expatriated from China, the managers are normally assigned to work long-term in the United States. Many expect to stay for longer than five years.¹⁴²

To sum up this subsection, though the ownership structure of most Chinese companies in the United States is such that their Chinese parents could wield absolute control over the operation of their U.S. investments, in practice the local managers sharing the positive outlook of U.S. institutions are often the decision-makers, and their interests should be better aligned with the performance of the U.S. investments given their relatively long-term assignment.

2. Access and Use of Knowledge and Skills Requisite for Adaptation

Another factor that determines the ability to adapt is access and use of local and professional knowledge about the U.S. institutions. Without it Chinese investors inclined to adapt cannot succeed given the significant differences between the two countries. Companies that have been accustomed to lax enforcement of law in China face formidable challenges

¹⁴⁰ A recent empirical study of Chinese companies investing in Germany found no rigid rules regarding the allocation of decision-making power between Chinese parents and their German subsidiaries. See Yun Schüler-Zhou & Margot Schüller, *An Empirical Study of Chinese Subsidiaries' Decision-Making Autonomy in Germany*, 12 *ASIAN BUS. & MGMT.* 321, 321 (2013).

¹⁴¹ 2% chose the other option, probably indicating a fully consensus-based decision-making procedure involving both the Chinese headquarter and the U.S. operation.

¹⁴² This is in accordance with the survey data.

adapting to the more sophisticated and stringent U.S. regulatory and legal environment. One way to overcome such barriers is by forming a joint venture with U.S. parties. An earlier study of Chinese multinational corporations in general found the method to be highly popular, with 79% operating abroad through joint ventures.¹⁴³ However, Chinese companies investing in the United States strongly prefer the use of subsidiaries (See Figure 6). Without a local partner, these investors have to rely on internal and external professionals to overcome the knowledge and skill gap.

The survey results show a high ratio of respondents with full-time in-house counsel. 32% reported to have in-house counsel who was a licensed lawyer, whereas 12% had in-house counsel who did not pass any bar. Another 16% of the respondents did not yet have an in-house counsel, but were planning to hire one. So in total 60% of the respondents had full-time staff to oversee the legal matters of their investments in the United States.

Besides law, regulatory compliance is also an area that sets China apart from the United States. It is reasonable to suspect that Chinese investors, given their records in China,¹⁴⁴ may demonstrate compliance weakness in the United States. The survey results, however, present preliminary evidence of the opposite. 27% of the respondents reported to have full-time staff in charge of compliance work. Another 18% had their in-house counsel handle compliance. And 18% of the Chinese investors did not currently have any full-time employee for compliance, but were planning to hire one. Thus, only 36% of the respondents neither had nor intended to add such a position.

Moreover, according to the survey findings in-house professionals were entrusted with significant authority. For Chinese companies that had in-house counsel, we inquired about the importance of their advice for management decision-making. 67% of the respondents answered “important” or “very important”. Only 4% thought in-house counsel opinions unimportant. Likewise, on the influence of the opinions of compliance officers, 71% of the respondents chose “important” or “very important,” and only 4% thought the opposite.

Given the complexity of the U.S. law, in-house counsel or compliance staff can hardly handle all the matters that may legally implicate the Chinese investors. Does the reliance on professionals reach outside the firms? The survey findings again answer in the positive. 65% of the

¹⁴³ Yang et al., *supra* note 41, at 152.

¹⁴⁴ For discussion about Chinese companies’ lack of compliance with labor law, see, for example, SEAN COONEY ET AL., *LAW AND FAIR WORK IN CHINA* 133–34 (2013). For discussion about compliance with environmental protection law, see, for example, Benjamin Van Rooij, *Regulating Land and Pollution at Lake Dianchi: Compliance and Enforcement in a Chinese and Comparative Perspective*, in MATTIAS BURELL & MARINA SVENSSON, *MAKING LAW WORK: CHINESE LAWS IN CONTEXT* 374–76 (2010).

respondents frequently engaged American lawyers and 33% had occasionally used their service, which leaves only 2% to have never used a U.S. lawyer. In choosing a U.S. lawyer, the Chinese investors paid the most attention to the lawyer's practice experience in relevant areas, followed by legal fee and the lawyer or law firm's general reputation. Only a few paid attention to the lawyer's government connections or Chinese background, and even fewer cared about the lawyer's educational background. These results indicate a rather sophisticated understanding by Chinese investors of the U.S. market for legal service. Factors that may be more important in China, *e.g.*, good government connections, are not highly valued by most Chinese investors in the United States.

In addition, the overall perception of the legal services provided by American lawyers appears positive. When asked to rate the level of satisfaction with the work of American lawyers on a one to five scale (one being very unsatisfied, five being very satisfied), 55% chose four and 9% chose five. Only 3% chose two, and no one chose one. Judging from such feedback, Chinese investors will continue to rely on U.S. lawyers while adapting to U.S. institutions.¹⁴⁵

The survey also indicates that, analogous to in-house counsel and compliance officers, U.S. lawyers play a major part in the decision-making of Chinese investors. On the role of professional legal advice in their investment or purchase decisions in the United States, 45% of the respondents reported to have consulted American lawyers prior to making their decisions, and the legal advice played an important role. 34% consulted U.S. lawyers prior to the decision, and the legal advice was used as a reference. 11% consulted U.S. lawyers after the decision, but considered their advice to be important, in comparison to 5% who acquired a legal opinion after the decision and used it as a reference. Only 5% of the respondents never consulted a U.S. lawyer in making the decision.

When asked why U.S. lawyers would not be consulted, "high legal cost" was the most cited reason, followed by "lack of reliable American lawyers." Cultural reasons such as the "fear of signaling hostility or lack of trust" that characterize Chinese dispute resolution did not seem to matter much.¹⁴⁶ Only one Chinese investor chose not to consult any U.S. lawyer to avoid sending the signal, and two decided not to engage lawyers because they transacted with acquaintances.

In sum, the generally positive perceptions of the U.S. political, business, and legal systems, combined with the allocation of decision-

¹⁴⁵ This should also be a result of selection. Companies presumably engage those lawyers on repeated basis whose service is considered satisfactory.

¹⁴⁶ Ji Li, *Interactions between Domestic Social Norms and International Law over Trade Dispute Resolution*, in *THE RULE OF LAW AT THE NATIONAL AND INTERNATIONAL LEVELS: CONTESTATIONS AND DEFERENCE* (Machiko Kanetake & Andraé Nollkaemper eds.) (forthcoming).

making power favoring executives stationed in the United States, the alliance of their interests with investment performance, and the heavy reliance on U.S. professionals and local talent set a favorable tone for prompt adaptation of Chinese investors to the host country environment.

Yet caution should be exercised before drawing a definitive conclusion that adaptive Chinese investors would not pose a critical threat to extant U.S. institutions. First, the theory may not have exhausted all relevant factors determining the adaptation of Chinese investors in the United States. Thus, it is possible that due to some omitted variables adaptation does not occur, or occurs slowly or in a non-linear fashion. Second, the findings about the ability to adapt present a mixed picture. Nearly half of the respondents reported the Chinese headquarters calling the shots about their U.S. operation. It is less clear whether these investors will respond to U.S. institutions in the same way as those locally managed. Additionally, much of the threat-no-threat question also depends on available preventive and remedial measures. Even if a fraction of Chinese investors fail to adapt, they may not pose an immediate threat provided the U.S. institutions are equipped with effective defense mechanisms.

Taking these issues into account, the following Part V conducts an in-depth case study of Chinese investors' adaptation to U.S. institutions on employment discrimination. Part VI then explores two much-debated threats from Chinese business expansion in the United States, the threat to national security and the threat of the Chinese variant of state capitalism to the U.S. model of free market capitalism. In addition to evaluating the general finding of Chinese investors' adaptation and investigating their potential threats, I choose these topics also because, despite the underlying theoretical and practical importance, their empirical analysis has been lacking.

V. AN IN-DEPTH CASE STUDY OF CHINESE INVESTORS' ADAPTATION TO U.S. INSTITUTIONS

The survey data discussed in Part IV portray most Chinese investors as inclined and able to adapt to U.S. institutions. The findings, however, are not definitive, especially given possible biases and the roughly balanced allocation of decision-making power between the Chinese investors and their U.S. managers. This Part V further explores the adaptation (or lack thereof), in the area of employment discrimination.

The area of labor rights protection has fueled much doubt and resentment about Chinese business globalization. To better analyze the adaptation of Chinese investors, the study focuses on the subtle and complex issue of employment discrimination, as big gaps exist between the two countries in this particular area. In addition, employment protection is more germane to Chinese companies investing in the United States than

other controversial areas such as environmental protection or product safety because many Chinese investors operate in the service sector (See Figure 4). Commercial banks, for instance, neither produce poisoned pet food nor pollute the rivers. But every Chinese investor in the United States, be it large or small, operates with a work force, so all should comply with U.S. rules prohibiting employment discrimination. Using the survey data, this subsection analyzes the adaptation (or lack thereof) of Chinese investors by investigating their employment practices.

Before proceeding to the analysis, a brief introduction of Chinese labor law regime follows as a necessary background. The dramatic transformation of China from a Soviet-style planned economy to state capitalism with a rather dynamic market drove the legislation of employment-related statutes in China. In the former system most workers were employees of the state and employment-related disputes could be internally resolved by their work units.¹⁴⁷ Once some were shoveled onto the market, their rights had to be protected by law. In response the Chinese legislature enacted a series of statutes for that purpose over time.

The PRC Labor Law, effective in 1995, set forth the basic legal rights of employees. Subsequent enforcement of the statute, however, failed to meet the high expectations as rampant violations and abuses of labor rights persisted.¹⁴⁸ Reacting to workforce discontent and to ease social tensions, the legislature passed additional employment-related laws.¹⁴⁹ Employment Contract Law (2007), for example, reallocated the legal rights and obligations between employers and employees in favor of the latter.¹⁵⁰ And non-judicial channels for resolving employment-related disputes were reinforced by the Law on the Mediation and Arbitration of Labor Dispute (2008).

The legislature also enacted the Employment Promotion Law, which took effect in January 2008.¹⁵¹ The highly progressive statute provided formal legal basis for eliminating many types of employment discrimination in China. Articles 28 and 29 of the statute encourage the hiring of ethnic minorities and people with disabilities.¹⁵² Article 30 prohibits discrimination against pathogen carriers of infectious diseases such as HIV

¹⁴⁷ Stanley Lubman, *Mao and Mediation: Politics and Dispute Resolution in Communist China*, 55 CALIF. L. REV. 1284, 1330 (1967).

¹⁴⁸ Sean Cooney, *Making Chinese Labor Law Work: The Prospects for Regulatory Innovation in The People's Republic of China*, 30 FORDHAM INT'L L.J. 1050, 1060 (2007).

¹⁴⁹ Virginia E. Happer Ho, *From Contracts to Compliance? An Early Look at Implementation under China's New Labor Legislation*, 23 COLUM. J. OF ASIAN L. 35, 39 (2009).

¹⁵⁰ Hilary K. Josephs, *Measuring Progress Under China's Labor Law: Goals, Processes, Outcomes*, 30 COMP. LAB. L. & POL'Y J. 373, 386 (2008).

¹⁵¹ Zonghua Renmin Gongheguo Jiuye Cujin Fa (中华人民共和国就业促进法) [P.R.C. Law on Employment Promotion] (promulgated Aug. 30, 2007 by Standing Comm. Nat'l People's Cong., effective Jan 1, 2008), http://www.gov.cn/flfg/2007-08/31/content_732597.htm.

¹⁵² *Id.*

or hepatitis B; Article 31 provides equal treatment for both urban workers and those migrating from rural areas.¹⁵³

Another important employment-related law in China is the Labor Union Law (2001). All Chinese unions belong to the All-China Federation of Trade Unions (ACFTU), and no independent union organizations are allowed under the law.¹⁵⁴ Operating under the party's direct leadership, the ACFTU has to keep a delicate balance between serving the interests of employers, which include powerful SOEs and multinational corporations critical to local and national GDP growth, and protecting the workers, whose dissatisfaction may lead to social discontent and instability.

While the Chinese laws in the books, after years of active legislation, resemble those of a well-developed civil law country with sophisticated legal protection of labor rights,¹⁵⁵ their enforcement in practice remains problematic.¹⁵⁶ Despite the general demographic changes in China that resulted in the reversal of the huge labor surplus in the 1990s and caused a labor "famine,"¹⁵⁷ various types of employment-related discrimination continue to plague the Chinese workplace.¹⁵⁸

Having been accustomed to such a domestic context of employment regulation, Chinese companies investing abroad may not prioritize the protection of workers' rights in their host countries, as evidenced by anecdotal reports about labor abuses such as underpayment, long working hours, and discrimination committed by Chinese investors in developing countries.¹⁵⁹ And it is not unreasonable to speculate that Chinese companies, when investing in the United States, will fall short of fully complying with the sophisticated legal regime for employment protection, especially the subtle and intricate rules prohibiting discrimination. Again, Japanese companies investing in the United States may serve as an illustrative example.

In the 1980s and early 1990s, the United States was the top FDI destination for Japanese companies.¹⁶⁰ Japan is known for its homogeneous

¹⁵³ *Id.*

¹⁵⁴ Ho, *supra* note 149, at 59.

¹⁵⁵ OECD ranked China highly in terms of employment protection legislation. See OECD, OECD INDICATORS ON EMPLOYMENT PROTECTION LEGISLATION (2013), <http://www.oecd.org/els/emp/EPL-data2013.xlsx>.

¹⁵⁶ Ho, *supra* note 149, at 39.

¹⁵⁷ *Id.* at 88.

¹⁵⁸ Timothy Webster, *Ambivalence and Activism: Employment Discrimination in China*, 44 VAND. J. TRANSNAT'L L. 643, 660–62 (2011).

¹⁵⁹ See, e.g., Simon Clark et al., *China Lets Child Workers Die Digging in Congo Mines for Copper*, BLOOMBERG (July 22, 2008), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aW8xVLQ4Xhr8>.

¹⁶⁰ For instance, in 1991 43% of all Japanese outflow investment ended in the U.S. See Schon Beechler & Zhuang Yang John, *The Transfer of Japanese-Style Management to American Subsidiaries: Contingencies, Constraints, and Competencies*, 25 J. INT'L. BUS. STUD. 467, 468 (1994).

culture that to a certain extent tolerates discrimination based on gender, age, nationality and race.¹⁶¹ Arriving from such a cultural and business environment, Japanese companies investing in the United States were frequently sued by employees.¹⁶² In response to the clash between their traditional employment practice and the U.S. laws against discrimination, Japanese firms had adopted a variety of tactics, from taking advantage of treaty exemptions¹⁶³ to using secretive communication code to screen job applicants according to their race, age, and national origin.¹⁶⁴

Now enter the Chinese investors. Will the Chinese companies bring to the United States the substandard employment practices and various forms of discrimination they have been accustomed to while operating in China? Before analyzing the survey results pertinent to this question, it is important to note that the U.S. legal context in which Chinese investors operate varies from the one for Japanese companies. Of the most importance for employment discrimination is the lack of a bilateral treaty similar to the Japan-U.S. Friendship Commerce and Navigation Treaty, which contains a provision granting Japanese companies investing in the United States great autonomy in filling executive positions.¹⁶⁵

Such a favorable treaty does not exist between the United States and China. Thus, all Chinese companies investing in the United States, regardless of their form, are bound by the entire U.S. legal framework for employment protection. Given the general findings in Part IV, *i.e.*, Chinese investors' positive perceptions of the U.S. systems, their commercial motives, the heavy reliance on local talent and U.S. professionals, one may reasonably expect Chinese investors to adapt quickly to the host country environment in terms of their employment practices.¹⁶⁶ As noted below, the survey findings largely confirm this expectation.

According to the survey, high labor cost tops the list of challenges faced by Chinese investors. Due to the development gap between the two countries, U.S. salaries are much higher than the salaries of Chinese

¹⁶¹ Linda N. Edwards, *Equal Employment Opportunity in Japan: A View from the West*, 41 IND. & LAB. REL. REV. 240 (1988).

¹⁶² John M. Mezas, *Identifying Liabilities of Foreignness and Strategies to Minimize their Effects: The Case of Labor Lawsuit Judgments in the United States*, 23 STRATEGIC MGMT. J. 229, 239–40 (2002).

¹⁶³ *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 179 (U.S. 1982).

¹⁶⁴ *Employment Discrimination by Japanese-Owned Companies in the United States: Before the Subcomm. On Employment and Housing of the H. Comm. On Government Operations*, 102nd Cong. 7–9 (1992) (statement of Paul Schmidtberger, former employee, Recruit U.S.A.).

¹⁶⁵ See, e.g., *Sumitomo Shoji Am., Inc.*, 457 U.S. at 181 (quoting Article VIII(1) of the treaty, which provides that “companies of either Party shall be permitted to engage, within the territories of the other party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice.” Yet “US subsidiaries of Japanese companies do not enjoy the treaty benefits”).

¹⁶⁶ See *supra* Part IV.

workers. For those Chinese firms that have hired local workers, the top three reasons are “for gaining access to U.S. market,” “for communicating with customers,” and “general knowledge of U.S. culture and market.” Given the market-seeking objective of most Chinese investors (see Figure 8) it is rational to rely heavily on local talent, despite the concern of higher cost.

As to the profiles of the U.S. employees, only 14% reported to hire mainly Chinese Americans; the vast majority 85% reported a U.S. workforce of racial and ethnic diversity. The Chinese investors also reported to be mostly satisfied with the performance of their U.S. employees. Only 5% of the respondents were less satisfied, compared to 50% who were satisfied, and 10% who were very satisfied. 18% of the respondents expressed a neutral view. These figures are comparable to the satisfaction level for employees expatriated from China, which indicates that Chinese investors will likely increase the hiring of local employees as the cost of Chinese labor continues to rise. The high satisfaction with the diverse U.S. workforce also suggests Chinese firms in the United States are less prone to discrimination on race, ethnicity or national origin.

There also exists more direct evidence in support of this conclusion. Since it is impractical to ask explicitly whether the respondents engage in employment discrimination, the survey instead inquired into the preventive measures taken by the Chinese investors.¹⁶⁷ Only 11% of the respondents reported to have not taken any measure to prevent employment discrimination. 19% had orally advised their employees against discrimination. 43% of the respondents adopted formal internal rules against discrimination and 27% not only had formal rules, but also provided training to their employees preventing employment discrimination, which is comparable to the percentage reported in a survey of American organizations.¹⁶⁸

While we cannot observe directly the extent of discrimination in the Chinese-invested firms, survey results indicate that employment discrimination has not been a major issue. 83% of the respondents reported to have received no employee complaint about discrimination. 8% reported to have handled such complaints through settlement. Only 4% had litigated discrimination complaints from employees.¹⁶⁹

¹⁶⁷ See *supra* Part IV.

¹⁶⁸ 31% of the surveyed American companies reported to have provided diversity training in 2012. See SOC’Y HUM. RES. MGMT., SHRM SURVEY FINDINGS: DIVERSITY AND INCLUSION 17 (2014), <http://www.slideshare.net/fullscreen/shrm/shrm-2013-survey-findings-diversity-inclusion-v5-34003340/2>. Among the American organizations with fewer than 500 employees, only 21% reported to have provided diversity training in 2012. *Id.* at 8. Given that few Chinese investors in the U.S. have a staff of more than 500 employees, we can infer that a Chinese company investing in the U.S. is more likely than an American organization to offer training preventing employment discrimination.

¹⁶⁹ One may suspect underreporting. It is possible, but should not be a serious problem given the

In sum, general data reported in Part IV suggest that Chinese companies investing in the United States are driven by commercial incentives, perceive positively of the U.S. institutions, and rely heavily on local and professional talent. Thus, they should be adaptive to the host country's legal and regulatory systems. This Part VI presents further empirical support to the argument. Survey data about employment practices indicate that, despite anecdotal reports critical of Chinese outward investors for violating labor rights in certain developing countries, those investing in the United States have adapted relatively well to the sophisticated U.S. legal and regulatory environment for employee protection.¹⁷⁰

VI. FURTHER ANALYSIS OF TWO POTENTIAL THREATS OF CHINESE BUSINESS EXPANSION

Even if empirically affirmed, however, the general tendency of adaptation shall not obscure the potential threats from deviant cases or groups of outliers. Thus, this article will also analyze the adequacy of extant U.S. institutions to protect against the risk of Chinese investment. Furthermore, Part VI.B resumes the discussion of the Chinese model of state capitalism and, drawing on the unique survey data, questions the claim that it may pose formidable challenges to the U.S. variant of capitalism.

A. The CFIUS Review and the *Ralls* Decision

This subsection discusses the legal framework for the CFIUS review process and its recent development subsequent to the D.C. Circuit decision in *Ralls v. CFIUS*, which held the committee's treatment of a Chinese investment case violated the investor's constitutional right to due process.¹⁷¹ As will be illustrated, the CFIUS review has over time been strengthened and despite the setback in *Ralls*, will remain a powerful institution to prevent and mitigate threats to U.S. national security by Chinese investors that are inadequately addressed by other laws.

Originally created in 1975 by an executive order, CFIUS was initially charged with monitoring the impact of foreign investment in the United States and coordinating relevant government policies.¹⁷² In response to the surge of FDI from Japan and other foreign countries, Congress enacted the "Exon-Florio Amendment" in 1988 to Title VII of the Defense Production Act of 1950, which empowered CFIUS to assist the President in reviewing

anonymity of the survey and the Association's independent third-party status.

¹⁷⁰ The adaptation may also be partially attributable to the development gap between China and the U.S. and lack of favorable treaty exemptions.

¹⁷¹ *Ralls Corp. v. CFIUS*, 758 F.3d 296, 319 (D.C. Cir. 2014).

¹⁷² Georgiev, *supra* note 83, at 126.

and blocking foreign investment considered to pose national security threats.¹⁷³ CFIUS, led by the Department of Treasury, consists of nine member agencies and invites several others to observe.¹⁷⁴ Later, a few high-profile acquisition attempts by foreign investors led to the passage of the Foreign Investment and National Security Act of 2007 (FINSAs), which amended and codified the CFIUS review process to provide more transparency and Congressional oversight.¹⁷⁵

Filing for CFIUS review is voluntary.¹⁷⁶ Once a filing is completed, CFIUS has thirty days to review and approve the investment or otherwise initiate a forty-five day investigation.¹⁷⁷ Any CFIUS agency can initiate the investigation.¹⁷⁸ At the expiration of the forty-five day period, unresolved issues will be submitted to the President, who must either approve or block the transaction within fifteen days.¹⁷⁹ The filing party may withdraw its case or re-file, which restarts the clock. CFIUS review is limited to covered transactions, which broadly refer to “any merger, acquisition, or takeover . . . by or with any foreign person which could result in foreign control of any person engaged in interstate commerce in the United States.”¹⁸⁰

The law fails to clearly define “national security,” but provides a non-exhaustive list of factors for making that determination, including investment that impacts “domestic production needed for . . . national defense,” “United States critical technologies,” “long-term requirements for . . . critical resources,” and “critical infrastructure.”¹⁸¹ Some had proposed to include “economic security” to the jurisdiction of CFIUS, but the term did not find its way into the statute or subsequent regulations.¹⁸² Although the filing is voluntary, CFIUS constitutes a powerful tool to regulate foreign investment in the United States as it can order divestiture of U.S. assets whenever a threat to national security is determined.¹⁸³ In addition, FINSAs

¹⁷³ Marc Greidinger, *The Exon-Florio Amendment: A Solution in Search of a Problem*, 6 AM. U. INT'L L. REV. 111, 112–14 (1991).

¹⁷⁴ *Composition of CFIUS*, U.S. DEP'T OF THE TREASURY, <http://www.treasury.gov/resource-center/international/foreign-investment/Pages/cfius-members.aspx>.

¹⁷⁵ Margaret Merrill, *Overcoming CFIUS Jitters: A Practical Guide for Understanding the Committee on Foreign Investment in the United States*, 30 QUINNIPAC L. REV. 1, 6 (2011).

¹⁷⁶ 31 C.F.R. § 800.401(a) (2011).

¹⁷⁷ 31 C.F.R. §§ 800.502–505 (2011); 50 U.S.C. app. § 2170(b)(2)(C) (2006).

¹⁷⁸ 50 U.S.C. app. § 2170(b)(1)(A) (2006).

¹⁷⁹ 31 C.F.R. § 800.506(b)(1)–(3) (2011); 50 U.S.C. app. § 2170(d)(2) (2006).

¹⁸⁰ 50 U.S.C. app. § 2170(a)(3) (2006).

¹⁸¹ *Id.* § 2170(f).

¹⁸² Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons, 73 Fed. Reg. 70702, 70705 (Nov. 21, 2008) (codified at 31 C.F.R. pt. 800), <http://www.treasury.gov/resource-center/international/foreign-investment/Documents/CFIUS-Final-Regulations-new.pdf> (indicating § 800.801 was drafted narrowly in line with CFIUS's intent to focus “on genuine national security concerns alone, not broader economic or other national interests.”).

¹⁸³ 50 U.S.C. app. § 2170(d)(3) (2006).

mandates an investigation of any foreign acquisitions of U.S. assets if such acquisition will result in foreign government control.¹⁸⁴ Furthermore, adding to the uncertainties of foreign investment in the United States, CFIUS is not time-barred from opening a review of a covered transaction,¹⁸⁵ and the actions and findings of the President through CFIUS review are not subject to judicial review.¹⁸⁶

From 2008 to 2012, 538 notices were filed,¹⁸⁷ mostly by companies from countries that are considered U.S. allies. The U.K. topped the ranking of source countries until 2012, when it was overtaken by China (See Figure 11.) CFIUS rarely rejected properly notified transactions, though it had persuaded some foreign investors to voluntarily withdraw from their proposed investment.¹⁸⁸ The regime is of particular relevance to Chinese investors as a higher percentage of Chinese companies are state controlled, and FINSA mandates CFIUS investigations of acquisitions resulting in foreign government control.¹⁸⁹

The CFIUS review process and its outcome is shrouded in uncertainties,¹⁹⁰ yet for decades no foreign investor had challenged a CFIUS action in court, probably because of the relatively loose enforcement prior to FINSA,¹⁹¹ the underlying national security nature of the process, and the statutory provision clearly constraining judicial review.¹⁹² That record, however, was recently shattered by a Chinese investor.

¹⁸⁴ *Id.* § 2170(b)(1)(B).

¹⁸⁵ Andreas Heinemann, *Government Control of Cross-Border M&A: Legitimate Regulation Or Protectionism?* 15 J. INT'L ECON. L. 843, 844 (2012).

¹⁸⁶ 50 U.S.C. app. § 2170(e) (2006).

¹⁸⁷ *Covered Transactions, Withdrawals, and Presidential Decisions 2008–2012*, U.S. DEP'T OF THE TREASURY, <http://www.treasury.gov/resource-center/international/foreign-investment/Documents/CFIUS%20Stats%202008-2012.pdf> (last visited Oct. 22, 2014).

¹⁸⁸ *Id.*

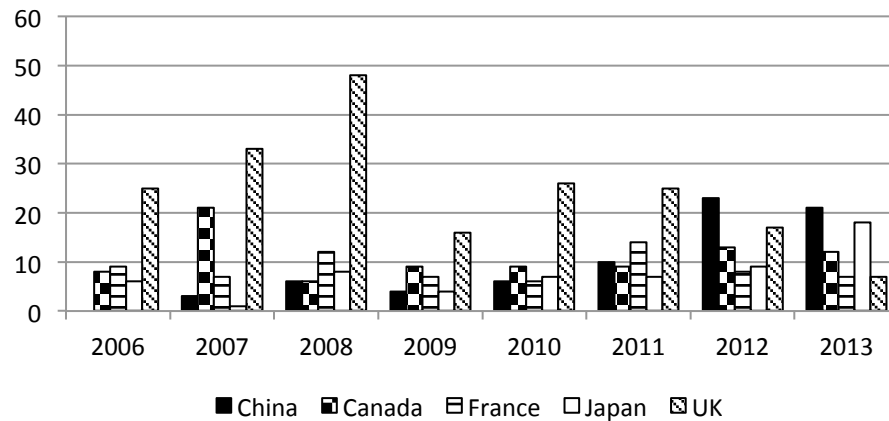
¹⁸⁹ 50 U.S.C. app. § 2170(b)(1)(B) (2006).

¹⁹⁰ See, e.g., Christopher M. Tipler, *Defining 'National Security': Resolving Ambiguity in the CFIUS Regulations*, 35 U. PA. J. INT'L L. 1223, 1243 (2014); Joshua C. Zive, *Unreasonable Delays: CFIUS Reviews of Energy Transactions*, 3 HARV. BUS. L. REV. ONLINE 169, 169 (2013).

¹⁹¹ David Zaring, *CFIUS As Congressional Notification Service*, 83 S.C. L. REV. 81, 87 (2009).

¹⁹² 50 U.S.C. app. § 2170(e) (2006).

Figure 11: Number of Covered Transactions by Acquirer Home Country (2006–2013)



Data source: Annual Reports to Congress (2008–2015) by Committee on Foreign Investment in the United States, available at <http://www.treasury.gov/resource-center/international/foreign-investment/Pages/cfius-reports.aspx>

In March 2012, Ralls Corporation, a U.S. company owned by two Chinese nationals, purchased four American companies with the intent to develop windfarms in north-central Oregon.¹⁹³ The purchased sites are located in and around the “region of a restricted airspace and bombing zone maintained by the United States Navy.”¹⁹⁴ After reviewing Ralls’s filing made post to the transaction at the request of the Defense Department, CFIUS determined that the acquisition threatened national security and issued interim mitigation orders restricting Ralls’s access to, and preventing further construction at, the windfarm sites pending the President’s final decision.¹⁹⁵ The matter was then submitted to President Obama, who concurred that the transaction posed a national security threat and issued an order blocking the transaction and requiring Ralls, among others, to divest from the American companies.¹⁹⁶

Throughout the CFIUS review process, Ralls received no explanation as to the factual basis of the determination and was provided no opportunity to rebut any evidence against it.¹⁹⁷ In response to the CFIUS actions, Ralls filed a lawsuit claiming, *inter alia*, the violation by CFIUS of its due process

¹⁹³ *Ralls Corp. v. Comm. on Foreign Inv. in U.S.*, 758 F.3d 296 (D.C. Cir. 2014).

¹⁹⁴ *Id.* at 304.

¹⁹⁵ *Id.* at 302.

¹⁹⁶ *Id.* at 306.

¹⁹⁷ *Id.*

right under the Fifth Amendment.¹⁹⁸ The district court initially dismissed most of Ralls's claims as moot or for lack of subject-matter jurisdiction.¹⁹⁹ Later the due process claim was also dismissed for failure to state a claim.²⁰⁰ Ralls appealed, and the D.C. Circuit surprisingly reversed.²⁰¹

The D.C. Circuit began by applying the "clear-and-convincing evidence" standard to avail itself of jurisdiction to review the constitutional due process claims and observed that the statutory bar under the Defense Production Act of 1950 applied only to the President's determinations, not the constitutionality of the process by which they are reached.²⁰² Moreover, it rejected the appellee's argument that Ralls's procedural due process claim was a nonjusticiable political question as the claim did not "encroach on the prerogative of the political branches," "did not require the exercise of non-judicial discretion," and was "susceptible to judicially manageable standards."²⁰³ After the review, the D.C. Circuit found Ralls was denied due process as it was neither informed of the nature of the national security concern with the acquisitions or the evidence on which the determination was based, nor allowed an opportunity to rebut the evidence.²⁰⁴

In post-brief proceedings the government also raised the defense of executive privilege, which the circuit court did not have a chance to fully address.²⁰⁵ The D.C. Circuit remanded the case to the district court with instructions that Ralls be provided access to the unclassified evidence on which the President relied and an opportunity to respond thereto.²⁰⁶ It also left the validity of the government's executive privilege defense to the lower court's determination.²⁰⁷

Ralls was the first lawsuit in which a foreign investor challenged the CFIUS process, and the outcome was unexpected.²⁰⁸ The setback, however, will not significantly weaken the institutional tool in protecting against any potential threat to U.S. national security of foreign investment through asset

¹⁹⁸ *Id.* at 315.

¹⁹⁹ *Id.* at 306.

²⁰⁰ *Id.* at 307.

²⁰¹ *Id.* at 309.

²⁰² *Id.* at 308–11.

²⁰³ *Id.* at 307–13.

²⁰⁴ *Id.* at 325.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ Liu Jie, *News Analysis: Why U.S. Court Sides with Chinese Company in Dispute with Obama?*, XINHUA NEWS (July 21, 2014, 2:25 PM), http://news.xinhuanet.com/english/indepth/2014-07/21/c_133499513.htm. The ruling is surprising even to experienced practitioners in the U.S. See, e.g., Sullivan & Cromwell LLP, *Ralls v. CFIUS: D.C. Circuit Explains Constitutional Due Process Requirements During CFIUS Review*, at 4 (July 17, 2014), http://www.sullcrom.com/siteFiles/Publications/SC_Publication_Ralls_v_CFIUS_DC_Circuit_Explains_Constitutional_Due_Process_Requirements.pdf.

acquisition.

First, if it chooses to, the government may succeed in shielding much of CFIUS review information from disclosure with executive privilege in the future. Though somewhat controversial due to absence in the Constitution,²⁰⁹ executive privilege—as “the right of the President and high-level executive branch officers to withhold information from Congress, the courts, and ultimately the public”—has been a “well-established constitutional power with a longstanding history in American government.”²¹⁰ While several major issues concerning the exercise of the privilege and its recognition remain unresolved, and historically its use varied under different presidencies, “the presumption in favor of the privilege is the strongest in national security or foreign policy.”²¹¹ The district court on remand drew a timeline for CFIUS to provide Ralls with access to relevant unclassified materials or otherwise assert executive privilege.²¹² CFIUS handed over more than 3,000 pages of documents to Ralls, claiming privilege over just a few. The two parties subsequently decided to settle, leaving the issue unresolved.²¹³

Moreover, the substantial compliance of CFIUS with the court ruling will unlikely overburden the agency in the future as disclosure is required only for unclassified information.²¹⁴ CFIUS may reach the same decision by relying on allegedly classified information. So even though the CFIUS process may be modified in accordance with the *Ralls* decision by incorporating certain procedural guarantees of the foreign investors’ due process rights, the institution retains wide latitude in screening, altering, and blocking proposed acquisitions of U.S. assets by foreign investors.

The survey results show that 55% of the respondents had never considered the issue of CFIUS review.²¹⁵ 23% had considered it but determined that the law would not apply to their transactions. 12% had filed the notices and 10% had skipped the filing for low perceived risk. The data is largely consistent with what is expected from profit-driven rational foreign investors. Though powerful, CFIUS review applies only to

²⁰⁹ Mark J. Rozell, *Executive Privilege and the Modern Presidents: In Nixon’s Shadow*, 83 MINN. L. REV. 1069, 1069 (1999).

²¹⁰ *Id.*

²¹¹ MARK J. ROZELL, EXECUTIVE PRIVILEGE: PRESIDENTIAL POWER, SECRECY, AND ACCOUNTABILITY 4 (2010)

²¹² *Ralls Corp. v. Comm. on Foreign Inv.*, 2014 U.S. Dist. LEXIS 177868, 36 Int’l Trade Rep. (BNA) 1010 (D.D.C. Nov. 6, 2014)

²¹³ Moreover, because of the settlement, the court did not have a chance to pass on the legality of CFIUS interim orders.

²¹⁴ *Ralls Corp. v. Comm. on Foreign Inv. in U.S.*, 758 F.3d 296 (D.C. Cir. 2014).

²¹⁵ Caution should be taken with regard to these findings due to the missing data. It is likely that most of those who refused to answer this question never considered CFIUS, which would result in a percentage higher than 55%.

acquisition of U.S. assets, not greenfield investments.²¹⁶ Since only 42% of the responding investors reported to enter the U.S. market through acquisitions, the majority would have no reason to consider filing a CFIUS notice. Those that had considered the issue responded to the perceived risk.

The CFIUS notice is voluntary, and the vast majority of the filings (338/538) are approved without investigation,²¹⁷ implying their low national security risk. It is, therefore, sensible to skip the filing in cases where an easy approval is expected. Consistent with the general findings of adaptation in the previous section, Chinese investors relied on U.S. lawyers in dealing with CFIUS. 57% of the respondents reported to have consulted legal counsel, and 95% had adopted the legal advice.

In sum, despite its recent loss in court, CFIUS remains a powerful tool to protect against national security threats from Chinese investments. And consistent with the general findings from the survey, Chinese investors react rationally and relied on the assistance of U.S. lawyers in complying with the CFIUS rules.

B. The Phantom Menace of State Capitalism with Chinese Characteristics

Another concern with Chinese investment in the United States is the unique state-business relationships in China that allegedly give the Chinese companies an unfair edge over their American competitors, which the U.S. legal system may not adequately handle.²¹⁸ As discussed earlier, China adopts what is known as a specific variant of capitalism, *i.e.* state capitalism, characterized by heavy state intervention in business sectors and active promotion of business development using state resources.²¹⁹

The Chinese economy is undergoing a dramatic transformation and the state-business relationships are in a state of flux.²²⁰ Thus, a clear definition of the Chinese model of capitalism remains at best tentative, and scholars still debate as to the core elements of the concept.²²¹ That being said, a few features patently distinguish the Chinese state-business relationships from

²¹⁶ Greenfield investments are defined as “start-up investment in new facilities.” Bruce Kogut & Harbir Singh, *The Effect of National Culture on the Choice of Entry Mode*, 19 J. INT’L BUS. STUD. 411, 412 (1988).

²¹⁷ The number of withdrawn notices, 32, is subtracted from the total number of notices to make the calculation, assuming those investments posed national security threat.

²¹⁸ Li-Wen Lin & Curtis J. Milhaupt, *We are the (National) Champions: Understanding the Mechanism of State Capitalism in China*, 65 STAN. L. REV. 697, 757 (2013).

²¹⁹ See generally ALDO MUSACCHIO & SERGIO LAZZARINI, REINVENTING STATE CAPITALISM: LEVIATHAN IN BUSINESS, BRAZIL AND BEYOND (2014).

²²⁰ Kellee Tsai, *Capitalists without a Class: Political Diversity among Private Entrepreneurs in China*, 38 COMP. POL. STUD. 1130, 1138 (2005).

²²¹ For example, a recent debate is about the propriety of focusing too much on SOEs for defining state capitalism. See Milhaupt & Zheng, *supra* note 49.

those of the United States. First, the state created and nurtured a group of “truly global Chinese companies that could compete with the large multinational companies that dominated global production chains.”²²² Following the Japanese Keiretsu model, these state-owned national champions “were allowed to establish their own financial companies.”²²³ To strengthen corporate governance and efficiency of these SOEs, the state engaged in “institutional outsourcing,”²²⁴ having many of them listed on stock exchanges abroad.²²⁵

Second, the tie is much closer, especially between the state and the Chinese SOEs. Senior managers of Chinese SOEs hold administrative ranks in the government’s *nomenklatura* at various levels.²²⁶ To align the interests of SOE managers and those of the ruling elite, a sophisticated evaluation system was established to supervise and incentivize the managers to achieve the policy objectives of the state.²²⁷ For instance, top managers of central SOEs, some of which are ranked as vice-ministers, may be further promoted to positions with the rank of minister or higher.²²⁸ Promotion-oriented SOE managers, therefore, tend to serve the interests of the state with greater enthusiasm.²²⁹

To many private Chinese companies connections with the state are of utmost importance, as they need the protection of the state to ensure the security of their investment.²³⁰ Ties with government officials serve as a substitute for formal institutions such as an effective and independent judiciary.²³¹ Given this heavy reliance on the state, private companies, especially those owned by red capitalists, are normally loyal followers of state policies.²³²

The dependence, however, is mutual, though in a highly tilted manner. The state attempts to maintain its legitimacy and control over the economy by co-opting leaders in the private sector.²³³ Successful business people were invited to join the ruling elite and wield political influence.²³⁴ To a

²²² Kjeld Erik Brødsgaard, *Politics and Business Group Formation in China: The Party in Control?*, 211 THE CHINA Q. 624, 628 (2012).

²²³ *Id.*

²²⁴ STEINFELD, *supra* note 5, 24–25.

²²⁵ *Id.* at 32.

²²⁶ Brødsgaard, *supra* note 222, at 626–27.

²²⁷ Naughton, *China’s Distinctive System: Can it be a Model for Others?*, *supra* note 87, at 452–53.

²²⁸ Li, *State-Owned Enterprises in the Current Regime of Investor-State Arbitration*, *supra* note 70, at 380.

²²⁹ *Id.*

²³⁰ Xin & Pearce, *supra* note 135, at 1654.

²³¹ *Id.*

²³² See generally Tsai, *supra* note 220, at 1130.

²³³ See generally BRUCE J. DICKSON, *WEALTH INTO POWER: THE COMMUNIST PARTY’S EMBRACE OF CHINA’S PRIVATE SECTOR* (2008).

²³⁴ Kellee S. Tsai, *Adaptive Informal Institutions and Endogenous Institutional Change in China*, 59

certain extent, the mutual dependence also reflects state capture.²³⁵ Private companies with abundant resources can influence policy making through various formal and informal channels such as bribery and lobbying.²³⁶ While private lobbying to impact public policy making is universal, in China it results in close and personal mutual dependence due to the lack of transparency and institutional checks.

Because of the close state-business relations, Chinese companies may benefit from all the public resources commanded by the government,²³⁷ which has been viewed as a potential threat to American economy.²³⁸ This is not the first time a variable form of capitalism has been perceived as threatening the fundamentals of the U.S. system. As noted earlier, FDI from Japan and the anxiety it instilled in Congress led to the Exon-Florio Amendment.²³⁹ Yet over time the U.S. model proved more resilient and the fear for Japanese companies gradually faded. Does the current alarm about state capitalism with Chinese characteristics contain anything unprecedented that amounts to a credible threat, or is it simply the second round of unnecessary collective panic?

For the following reasons, I contend the Chinese model of state capitalism in its current form will unlikely pose an existential threat to U.S. institutions through investment by Chinese companies. While the label of *Japan, Inc.* lost much of its substantive meaning in the 1980s as Japanese policy making was gradually fragmented,²⁴⁰ Chinese control over the market and the business sector is by no means more integrated or coherent. The 140,000 Chinese SOEs are subject to control and leadership of governments at several different administrative levels by a great variety of agencies.²⁴¹ Even SASAC, the central agency charged with exercising the shareholder rights of the central government in some of the largest SOEs, has to share its power with the SOEs.²⁴²

And the state itself is highly fragmented. Power is contested for among different factions across subject areas and patronage networks. Different government agencies and ministries, often with diverging interests or policy

WORLD POLITICS 116, 132–33 (2006).

²³⁵ Tsai, *supra* note 220, at 1136.

²³⁶ Guosheng Deng & Scott Kennedy, *Big Business and Industry Association Lobbying in China: The Paradox of Contrasting Styles*, 63 CHINA J. 101, 111–14 (2010).

²³⁷ For a detailed description of measures taken by the Chinese government to promote outbound investment, see Yadong Luo et al., *How Emerging Market Governments Promote Outward FDI: Experience from China*, 45 J. OF WORLD BUS. 68, 75–76 (2010).

²³⁸ SZAMOSZEGI, *supra* note 20, at ix.

²³⁹ David Zaring, *CFIUS as a Congressional Notification Service*, 83 S. CAL. L. REV. 81, 92 (2009).

²⁴⁰ See generally T. J. Pempel, *The Unbundling of “Japan, Inc.”: The Changing Dynamics of Japanese Policy Formation*, 13 J. OF JAPANESE STUD. 271 (1987).

²⁴¹ Li, *State-Owned Enterprises in the Current Regime of Investor-State Arbitration*, *supra* note 70, at 401.

²⁴² Brødsgaard, *supra* note 222, at 630–31.

goals, contend with each other over the control and administration of business groups.²⁴³ In addition, the extent to which the state can effectively control the SOEs is determined by multiple factors including promotion probability, the political stature of the top SOE leaders, the salience and openness of the sector in which the SOEs operate, and the percentage and density of state ownership.²⁴⁴ Given these structural differences, the Chinese government simply cannot design or effectively implement the same type of long-term cross-sector growth strategies as the Japanese government agencies allegedly did in the 1980s and early 1990s.²⁴⁵

Moreover, due to the way officials are evaluated, promotion-oriented top executives of Chinese SOEs tend to make short-term cost-benefit analyses.²⁴⁶ They tend to concentrate on investments that can generate substantial returns before the end of their current terms or before they are transferred to another post.²⁴⁷ Such short-term behavior, which is individually rational in the institutional context of the SOEs, is not compatible with systemic implementation of long-term economic policies. Thus, it is unlikely that Chinese companies investing in the U.S. will coordinate and tolerate short-term losses in the U.S. market to gain market dominance over the long run.

In addition, after years of reforms of the corporate governance for SOEs, most of the managers assuming the dual roles of business executive and party official “increasingly prioritize their economic identities over their political ones, representing corporate interests.”²⁴⁸ Profitability of SOEs was set as a key criterion to evaluate the performance of their managers, and those whose investment decisions led to substantial losses were penalized.²⁴⁹ Furthermore, the Chinese SOEs, though large by size, generate profits mainly from their oligopolistic positions in the Chinese market, a privilege they do not enjoy outside China.

As to large and competitive private companies in China that are viewed by some as an important component of Chinese state capitalism,²⁵⁰

²⁴³ *Id.* at 631; Margaret M. Pearson, *The Business of Governing Business in China: Institutions and Norms of the Emerging Regulatory State*, 57 *WORLD POL.* 296, 308–09 (2005); Chih-shian Liou, *Bureaucratic Politics and Overseas Investment by Chinese State-Owned Oil Companies: Illusory Champions*, 49 *ASIAN SURV.* 670, 685 (2009).

²⁴⁴ Li, *supra* note 70, at 395.

²⁴⁵ Yang Jiang, *Red Trojan Horses? A New Look at Chinese SOEs' Outward Investment*, 2 *J. OF CHINA & INT'L REL.* 1, 18–19 (2014).

²⁴⁶ See generally Dan Haglund, *In it for the Long Term? Governance and Learning among Chinese Investors in Zambia's Copper Sector*, 199 *THE CHINA Q.* 627 (2009).

²⁴⁷ Victor Shih, *Tools of Survival: Sovereign Wealth Funds in Singapore and China*, 14 *GEOPOLITICS* 328, 335 (2009).

²⁴⁸ Liou, *Bureaucratic Politics and Overseas Investment by Chinese State-Owned Oil Companies: Illusory Champions*, *supra* note 243, at 677.

²⁴⁹ Jiang, *supra* note 245, at 11.

²⁵⁰ Milhaupt & Zheng, *supra* note 49.

their ties to the Chinese government are also segmented. Diversity in backgrounds and preferences of Chinese entrepreneurs leads to varied responses to state policies.²⁵¹ While those benefiting from political connections are generally “loyally acceptant” of the state rules and policies, those without tend to be more assertive of their own interests.²⁵² Thus, it is unlikely that private Chinese companies investing in the U.S. would constitute a homogeneous group of agents zealously doing the bids of the Chinese government.

In sum, because power is fragmented within the political structure, the state-business ties are segmented, and the government control is incapable of effectively reaching outside the national border, the concept of a monolithic and omnipotent Chinese state dictating overseas investment does not well reflect the reality. The survey results bear out this non-threat argument. As discussed earlier, the Chinese government’s “go global” policy did not appear to have played a direct and essential role in the actual investment decisions of Chinese companies.²⁵³ And, the profits of Chinese investors in the U.S. do not deviate from reasonable levels. 45% of the respondents broke even in 2013. 24% made a profit, and 32% reported a loss. As noted earlier, 6% reported that U.S. business profits were much higher than their global profit level. 19% reported to be slightly higher. 39% saw their U.S. profit to be on par with their global profit. 19% reported lower profit in the United States than globally, and 17% found the profit level in the United States to be much lower than the global level. From the data, we cannot detect any sign of extraordinary profits, which would suggest high competitiveness of Chinese businesses in the U.S. market, or of unreasonably high losses, which would indicate home state intervention or subsidy.

To evaluate the potential threat from Chinese business expansion bankrolled by cash-rich state-owned banks in China,²⁵⁴ the survey inquired about the financing of Chinese FDI in the U.S. Most Chinese investors (seventy-two respondents made this selection) used their own earnings to invest in the United States,²⁵⁵ and thirty-two borrowed from Chinese state-owned banks. Sixteen respondents received loans from non-state owned banks to finance the investment in the United States; eight respondents

²⁵¹ Tsai, *supra* note 220, at 1146.

²⁵² *Id.*

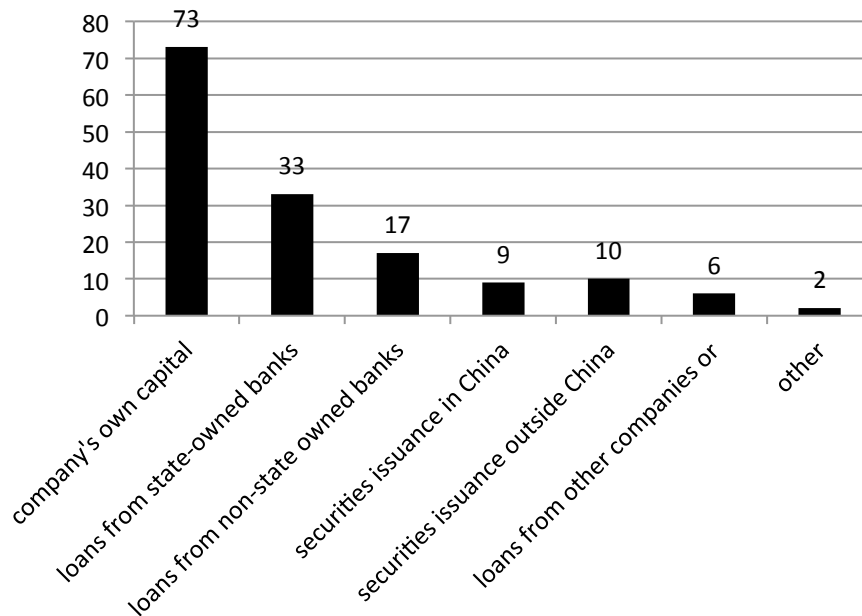
²⁵³ See *supra* Part IV.A.1.

²⁵⁴ Ken Miller, *Coping with China's Financial Power: Beijing's Financial Foreign Policy*, 89 FOREIGN AFF. 96 (2010); Luo et al., *supra* note 237, at 75. For an example of global acquisition by a Chinese SOE using generous loans from Chinese state-owned banks, see Shujie Yao & Dylan Sutherland, *Chinalco and Rio Tinto: A Long March for China's National Champions*, 199 THE CHINA Q. 829, 832 (2009).

²⁵⁵ This adds empirical support to the argument drawn from a recent case study. Jiang, *supra* note 245, at 14.

relied on stock issuance in China, and ten raised capital by issuing securities outside China. Only six respondents borrowed from Chinese individuals and companies.

Figure 12: Source of Funding for FDI



Though the vast majority of the respondents relied on their own earnings to invest in the United States, and borrowing from state-owned banks appear to play a secondary role, the overt self-reliance may actually reflect Chinese government support. Chinese government policies towards national champions were such that their parents could retain 90% the profits,²⁵⁶ so most used them for reinvestment.²⁵⁷ Such a favorable policy, however, is undergoing significant modification and recent rules had set a target for collecting SOEs' earnings and profits as a source of government revenue.²⁵⁸

To address this issue, the respondents were asked to compare

²⁵⁶ Guoqi Lirun Shangjiao Xianzhuang: Wulei Bili Zuigao 20%, 90% Bei Fanhuan (国企利润上缴现状: 五类比例最高20% 90%被返还) [Current Situation of SOE Profits Remission: Five Categories with Highest Rate of 20%, 90% Returned], CAIJING (财经) (Nov. 15, 2013), <http://finance.sina.com.cn/china/20131115/170417338178.shtml> (last visited Sep. 20, 2014).

²⁵⁷ Brødsgaard, *supra* note 222, at 632.

²⁵⁸ See *supra* note 255 and accompanying text.

borrowing in the United States with borrowing in China. Though major banks in China are all state-owned, they have prioritized profitability in the lending practice. Some have argued that serving the policy interests of the state is more a coincidence than the objective of credit issuance to SOEs or private national champions investing overseas.²⁵⁹ 49% of the respondents considered financing in the United States to be of the same difficulty level as in China. 23% thought it more difficult in the United States and 27% found it to be easier. The results suggest that Chinese companies do not enjoy significant comparative advantages from financing by Chinese policy banks in making their U.S. investments.²⁶⁰

The fragmentation of state authority also vitiates its capacity to coordinate the business activities of Chinese companies investing abroad.²⁶¹ The survey results suggest weak ties or lack of confidence or trust between the Chinese government and Chinese investors in the United States. When asked in a multiple choice question what to do if facing unfair competition in the United States, only sixteen intended to seek the assistance of relevant Chinese authorities, while forty-one would litigate, twenty-eight would negotiate directly with the competitors, and twenty-seven would solicit the help of business associations. Even the U.S. governments appeared more helpful, as twenty-three would petition for its intervention.

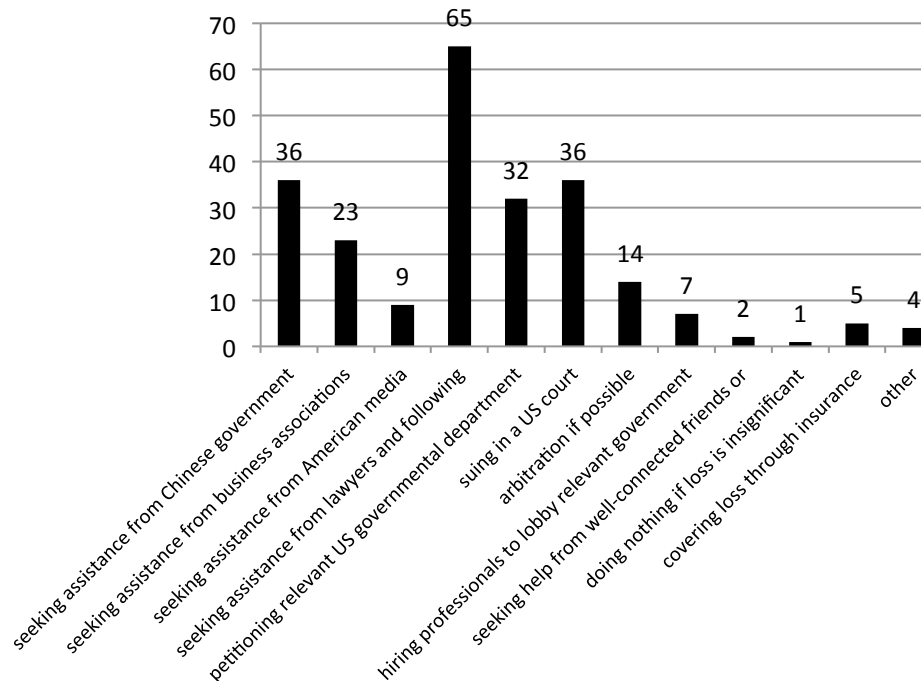
When asked what they would do if treated unfairly by the U.S. government, the most popular choice was to consult a lawyer and follow the legal advice (sixty-four). That was followed, by a large margin, by “litigating in a US court” (thirty-five), which tied with “seeking the assistance of the Chinese government” (thirty-five). Petitioning to relevant U.S. government departments came in as the next popular choice (thirty-two). The minor difference between the two choices indicates the lack of confidence or of close ties between Chinese investors and their home government.

²⁵⁹ E.g., Jiang, *supra* note 245, at 14; Erica Downs, *Inside China, Inc.: China Development Bank's Cross-Border Energy Deals*, BROOKINGS INST. PAPER (Dec. 9, 2011), <http://www.brookings.edu/research/articles/2011/12/09-china-development-bank-downs>.

²⁶⁰ A caveat is that Chinese SOEs investing in the U.S. may be financed in the U.S. by Chinese state banks that have set up operation in the U.S. For example, by May 2015 the Bank of China's New York branch had provided \$7.4 billion loans to Chinese companies investing in the U.S. Zhong Yixing (钟忆行), *Zhongguo Yinhang: Jiaqi Zhongmei Maoyi de Qiaoliang* (中国银行: 架起中美经贸往来桥梁) [*Bank of China: A Bridge for Sino-US Trade and Business*], PEOPLE'S DAILY (Sept. 25, 2015), <http://money.people.com.cn/stock/n/2015/0925/c67815-27633101.html>.

²⁶¹ Chih-shian Liou, *Rent-Seeking at Home, Capturing Market Share Abroad: The Domestic Determinants of the Transnationalization of China State Construction Engineering Corporation*, 54 WORLD DEV. 220, 228 (2014).

Figure 13: How Chinese Investors Respond to Unfair Treatment by the U.S. Government



In sum, despite the apparent state dominance over the market and Chinese companies, the Chinese government lacks requisite capacity to coordinate long-term and coherent investment strategies in the United States. Therefore, Chinese investors in the United States are unlikely loyal agents of formidable state capitalism dedicated to or capable of challenging U.S. business or the free-market economy. To be sure, some U.S. companies will face mounting competition from expanding private Chinese companies that are able to take advantage of cheap labor at home, but U.S. consumers will ultimately benefit from the intensified competition.

Part VII analyzes in more detail the two potential threats from Chinese companies investing in the United States, i.e., the threat to national security and the threat to free market capitalism. Combining the unique survey data with institutional analysis, the Section demonstrates that the CFIUS review process remains a powerful mechanism to guard against foreign investment that potentially threatens U.S. national security, and that the Chinese model of state capitalism will not likely triumph in battles with the U.S. variant of free market capitalism.

VII. THEORETICAL AND POLICY IMPLICATIONS

Based on the first ever comprehensive survey of Chinese companies investing in the United States, this paper fills major gaps in the extant literature and debate about the rise of China, its global business expansion, and the impact on U.S. legal and political systems. According to the survey findings, Chinese investors are mostly rational and motivated by strategic business concerns,²⁶² echoing the argument that “the emergence of SOEs’ commercial interests from the process of corporatization has transformed the firms into market players.”²⁶³ Thus, existing theories of FDI that are predicated on the assumption of rational actors, once modified to incorporate major Chinese institutional and cultural characteristics, will likely provide good analytical tools for understanding the actions of Chinese investors in the United States.

In addition, the survey findings suggest that the fear of recalcitrant Chinese investors threatening U.S. institutions lacks solid factual basis. Commercially-motivated Chinese investors hold very positive views about U.S. business, legal, and political systems and, despite their concerns with high cost, rely heavily on professionals and local employees. As a result, most large Chinese investors willingly adapt to the host country environment and behave in ways similar to their U.S. competitors. In other words, the investors are mostly “playing our game” by the established rules.

Moreover, the finding of business rationality in China’s outbound investment also sheds light on the varying motivations and actions of Chinese investors in different countries. In places of weak state institutions, Chinese investors, commercially motivated and highly adaptive, will more likely “export their Chinese problems” by retaining practices such as disregarding environmental regulations, violating labor rights, and bribing local officials.²⁶⁴ By comparison, in countries with a sophisticated and effective legal system and transparent governance, commercially-motivated Chinese investors generally go after know-how, technology, market, and global brand, and will act like their local competitors.²⁶⁵

²⁶² This is consistent with the finding that Chinese companies, state-owned or private, are generally market seekers. *E.g.*, Ramasamy et al., *supra* note 45, at 24; Liou, *supra* note 243, at 679; Boateng et al., *supra* note 110, at 259.

²⁶³ Liou, *supra* note 261, at 221.

²⁶⁴ Barry Sautman & Yan Hairong, *Bashing ‘the Chinese’: Contextualizing Zambia’s Collum Coal Mine Shooting*, 23 J. CONTEMP. CHINA 1073, 1075–78 (2014).

²⁶⁵ Business scholars have found Chinese investors drawn to large markets of developed countries, and countries with poor institutions but large nature resources. Kolstad & Wiig, *What Determines Chinese Outward FDI?* 33 (CMI, Working Paper No. 3, 2009). For studies of Chinese FDI in Europe, see, for example, Carlo Pietrobelli et al., *Chinese FDI Strategy in Italy: The ‘Marco Polo’ Effect*, 4 INT’L J. TECHNOLOGICAL LEARNING, INNOVATION AND DEV. 277, 281 (2011); Ling Liu & Ying Tian, *The Internationalisation of Chinese Enterprises: The Analysis of the UK Case*, 4 INT’L J. OF TECH. & GLOBALISATION 87, 89–90 (2008).

Furthermore, U.S. law safeguarding national security from foreign investors has evolved in the past three decades and the current CFIUS process is a powerful gatekeeper, and remains so in spite of CFIUS's recent unprecedented loss in *Ralls*.

The findings of this study also contribute to the nascent debate of state capitalism with Chinese characteristics. Despite the relative success of the Chinese government in insulating the economy from the global recession, the political structure in China and the state-business relationships are such that the Chinese model of state capitalism will unlikely constitute a formidable challenge to other variants of capitalism in their home fields.²⁶⁶ Fragmented political power at home constrains the state's capacity to orchestrate long-term industrial and investment policies to be implemented by vastly diverse Chinese companies. Its reach is further curtailed beyond the state border. As the survey results have shown, when in trouble, Chinese investors in the United States show more faith in American lawyers and the host government than their purportedly omnipotent and resourceful home government.

The empirical findings of this study have significant policy implications as well. Compared to their Japanese counterparts, Chinese investors rely more heavily on local employees and professionals, so states with high unemployment rates will benefit from investment policies targeted at Chinese companies. In addition, the findings of the study about the reliance on American service professionals suggest the most effective way to regulate Chinese investors is through these intermediaries. The regulations should achieve two distinct policy objectives: (1) to ensure the professionals will guide Chinese investors in compliance, helping them to avoid being misdirected by short-term interests of their clients that contradict U.S. law or public policy, and (2) to prevent the professionals from abusing the trust and reliance of the Chinese investors. Lack of local knowledge renders Chinese investors easy prey of scrupulous service providers in the United States. To protect the rights and interests of foreign investors and the reputation and integrity of the U.S. market, relevant authorities should enhance their law enforcement efforts against professionals targeting Chinese clients. Furthermore, faced with the sharp rise of Chinese investments, U.S. policymakers should resist the temptation to indiscriminately erect legal and regulatory barriers, as they have done previously in response to surging FDI from other source countries,²⁶⁷ unless doing so is guided by not only unambivalent public policy but also solid empirical research.

Though this study adds a great deal of much-needed empirical

²⁶⁶ HALL & SOSKICE, *supra* note 78.

²⁶⁷ C. S. Eliot Kang, *U.S. Politics and Greater Regulation of Inward Foreign Direct Investment*, 51 INT'L ORG. 301, 301 (1997).

evidence to the ongoing debate about China's business globalization and its impact on U.S. institutions, it leaves open several important questions for in-depth analysis in the future. Taken as a whole, Chinese investors appear adaptive to the host country environment. But significant variations exist within this group in terms of the desire and ability to adapt. What factors explain such variations? Is the adaptation a function of how long they have operated in the U.S. market, differences in ownership structure, investment area, or some other unknown variables yet to be explored? Also, the article does not explore the exact distribution of investor adaptation among the four quadrants in the two-by-two matrix (See Figure 3). Some Chinese companies investing in the United States must fall in Quadrants I, II, and III, and engage in superficial adaptation or noncompliance with extant U.S. institutions. As Chinese investment inflows continue to grow, will more join their rank? How can government policies incentivize a migration to Quadrant IV? Moreover, as noted earlier, the survey method is not flawless. Possible biases may weaken the evidentiary power of the findings. Future studies employing multiple empirical methods are welcome to cross-examine the results and the arguments presented in this article and to test alternative theoretical explanations.

VIII. CONCLUSION

Having overtaken Japan to be the second largest economy in the world (first if measured by PPP), China is set to surpass the United States in less than a decade.²⁶⁸ In addition, the Chinese market is nearing saturation and the cost of labor is skyrocketing.²⁶⁹ Meanwhile, the Chinese government is actively promoting outbound investment by loosening relevant regulations and providing policy and monetary incentives for Chinese firms to "go global."²⁷⁰ All of these factors contribute to the surge of investment outflow, making China the third largest source of FDI.²⁷¹ And the United States is quickly emerging as the most favorable destination for Chinese investors.²⁷²

The United States has never in its history experienced significant investment inflows from a developing country that was not a political ally. The potential size of Chinese investment, the distinct features of the Chinese economy, and the perceived incompatibility of state capitalism with a free market economy easily fuel public fear and academic suspicions, potentially causing a major rebalance between the time-honored American

²⁶⁸ See *supra* note 1.

²⁶⁹ Mitali Das & Papa N'Diaye, *The End of Cheap Labor*, 50 FIN. & DEV. (June 2013), <http://www.imf.org/external/pubs/ft/fandd/2013/06/das.htm>.

²⁷⁰ See Si, *supra* note 21.

²⁷¹ See Sauvart, *supra* note 24.

²⁷² See Shih, *supra* note 26.

tradition of keeping an open economy and the urgent need to safeguard U.S. economic and national security. Given the substantial stake, it is imperative to get an objective assessment of the “threat” of Chinese investment before policymakers and lawmakers adopt major defensive measures.

Based on the first large-scale survey of Chinese investors in the United States, this study finds evidence suggesting that the threat is inflated. Despite recent damage to American soft power, Chinese investors generally perceive highly U.S. business, legal, and political institutions. Most of the investors are commercially-motivated, and are drawn to the United States by its market, advanced technology, and brand enhancement value. Unlike their Japanese counterparts, the Chinese investors rely heavily on local talent. American lawyers, for instance, play an essential role in the decisions of their Chinese clients. As a result, the adaptive Chinese investors are by and large “playing our game.”

Also, structural features of Chinese politics determine that its model of state capitalism may not constitute a credible long-term threat to the United States. And the CFIUS review, established partially in response to the perceived threat from Japanese investment in the 1980s and amended over time, remain a powerful mechanism for protecting core U.S. interests despite the recent setback in *Ralls*. In addition, to effectively and cost-efficiently control “rogue” Chinese investors and to protect those in good compliance with the U.S. law, relevant authorities should focus on supervising the professional intermediaries.

In retrospect, Japanese FDI in the United States, much feared and resented in the 1980s, “increased U.S. competitiveness, employment and productivity.”²⁷³ Regulated properly, Chinese investors may also become an important stakeholder in extant U.S. business, legal, and political institutions and a potential contributor to their long-term resilience.

²⁷³ ELWELL ET AL., *supra* note 17, at 54.